

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEW JERSEY

3  
4 MARY ANN SIVOLELLA, et al,  
5 PLAINTIFFS

6 Vs. CIVIL NO.  
7 11-4194 (PGS)

8 AXA EQUITABLE LIFE INS. CO.,  
9 et al,  
10 DEFENDANTS

11 GLENN D. SANFORD, et al,  
12 PLAINTIFFS

13 Vs. CIVIL NO.  
14 13-312 (PGS)

15 AXA EQUITABLE FUNDS  
16 MANAGEMENT GROUP,  
17 DEFENDANT

18  
19 JANUARY 29, 2016  
20 CLARKSON S. FISHER COURTHOUSE  
21 402 EAST STATE STREET  
22 TRENTON, NEW JERSEY 08608

23  
24 B E F O R E: THE HONORABLE PETER G. SHERIDAN  
25 U.S. DISTRICT COURT JUDGE  
DISTRICT OF NEW JERSEY

TRIAL - DAY 12

26  
27 Certified as true and correct as required  
28 by Title 28, U.S.C. Section 753  
29 /S/ Francis J. Gable  
30 FRANCIS J. GABLE, C.S.R., R.M.R.  
31 OFFICIAL U.S. REPORTER  
32 (856) 889-4761

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2 A P P E A R A N C E S:

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21 JAMES N. BENEDICT, ESQUIRE  
22 FOR THE DEFENDANTS

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24 ALSO PRESENT: PATRICIA LOUIE, ESQUIRE  
25 MANAGING DIRECTOR & ASSOCIATE GENERAL COUNSEL  
AXA EQUITABLE LIFE INSURANCE CO.

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**1** I N D E X

<b>2</b>	STEVE POMERANTZ	1955
<b>3</b>	DIRECT EXAMINATION OF STEVE POMERANTZ, Ph.D., CONTINUED BY MR. SWEETSER	1956
<b>4</b>	CROSS-EXAMINATION OF STEVE POMERANTZ PH.D. BY MR. MURPHY	1985
<b>5</b>	REDIRECT EXAMINATION OF STEVE POMERANTZ, PH.D., BY MR. SWEETSER	2048

**6**

**7**

**8**

E X H I B I T S

**9**

<b>10</b>	plaintiff's Exhibit 151-J was marked into evidence	1981
<b>11</b>	Plaintiff's Exhibit 151-K was marked into evidence	1984
<b>12</b>	Defendant's Exhibits 1886 and 1886.1 were marked into evidence	2011
<b>13</b>	Plaintiff's Exhibit 151-I was marked into evidence	2060

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1 THE COURT: Good afternoon. Please be seated.

2 All right. So, I might as well go through the  
3 schedule for the remainder of the trial. So, next week we'll  
4 meet on Tuesday at 12:00, plus the 4th and the 5th; and I  
5 believe the Friday the 5th will be the plaintiff's last day.  
6 Then the defendants will have the 8th, 9th, 10th, 11th, 18th  
7 and 19th, 22nd and 23rd; eight days. Mr. Benedict wanted to  
8 add four more days on there, but I don't think so.

9 MR. MURPHY: I'll put his head in a vice this  
10 afternoon.

11 THE COURT: Exactly. So, that was what was  
12 originally contemplated, so I don't see why we should -- and  
13 it's the best I can do getting you all in in one timeframe as  
14 we could. Any objections to that?

15 MR. KORN: I just want to confirm, Tuesday the 2nd,  
16 your Honor, are we starting 10:30 or noon?

17 THE COURT: 12:00. And then the 4th and the 5th.  
18 All right?

19 Mr. Sweetser?

20 MR. SWEETSER: Your Honor, plaintiffs call Dr.  
21 Pomerantz back to the stand.

22 (STEVE POMERANTZ, Ph.D., previously sworn, resumes  
23 witness stand.)

24 THE COURT: Good morning, Mr. Pomerantz. You're  
25 still under oath.

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1 THE WITNESS: Yes.

2 (DIRECT EXAMINATION OF STEVE POMERANTZ, Ph.D., CONTINUED BY

3 MR. SWEETSER:)

4 Q. Dr. Pomerantz, is one of the opinions that you provided

5 in this case taking an allocation of fallout benefits

6 calculated by Mr. Barrett and allocating them to the

7 individual funds?

8 A. Yes.

9 Q. I'm going to show you what's been marked as P-151-L and

10 ask you if you recognize that document.

11 A. Yes.

12 Q. Would you please tell the Court what P-151-L is.

13 A. This is a chart I prepared that allocates the defined

14 fallout benefit to the respective subject funds.

15 MR. MURPHY: Just objection, your Honor; you know,

16 as we discussed yesterday, Mr. Pomerantz as I understand the

17 ruling is --

18 THE COURT: I found he wasn't qualified to testify

19 on fallout benefits.

20 MR. SWEETSER: Your Honor, this is the allocation

21 which counsel expressly said he didn't have a problem with him

22 doing allocating to the individual funds. It's nothing other

23 than taking a number of a document which is already in

24 evidence, which I'm going to be informing the Court about in a

25 moment, and allocating to the funds. It's a simple

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1 mathematical calculation.

2 THE COURT: Denied.

3 MR. SWEETSER: Denied, we can't put this evidence  
4 in?

00:03 5 THE COURT: Yes. I didn't find him qualified to  
6 talk about fallout benefits. I haven't heard -- I said that  
7 you could renew the application, but I haven't heard since  
8 that time any qualifications that would allow Mr. Pomerantz to  
9 discuss fallout benefits. So, when you say putting numbers on  
00:04 10 a page, someone has to calculate what that number is, and if  
11 he's thinking that some number represents fallout benefits he  
12 doesn't have to qualifications to do that.

13 MR. SWEETSER: And he's not thinking that, your  
14 Honor.

00:04 15 THE COURT: So it's denied.

16 MR. SWEETSER: Okay.

17 BY MR. SWEETSER:

18 Q. I'm going to show you what's been marked into evidence as  
19 P-197-A and ask if you recognize this document.

00:04 20 A. Yes.

21 Q. Can you please tell the Court what P-197-A is.

22 A. This is an exhibit prepared by Mr. Barrett that  
23 identifies the fallout benefits for years 2000 to 2012.

24 Q. And did you do any calculation with respect to the  
00:05 25 information on P-197-A as it relates to the plaintiffs' funds?

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1 MR. MURPHY: Objection, your Honor. My  
2 understanding is he's just end-running your denial. He's  
3 showing him the starting point of the analysis he just tried  
4 to do and trying to get in the calculation of fallout  
5 benefits.

00:05

6 MR. SWEETSER: Our Honor, the calculation of fallout  
7 benefits is already in evidence. All he did for the Court's  
8 assistance was to take the big number calculated by Mr.  
9 Barrett, and just do the mathematical calculation to the  
10 funds. That's all he's done, that's all this exhibit is.

00:05

11 THE COURT: Go ahead, Mr. Murphy.

12 MR. MURPHY: So, your Honor, if he's --

13 THE COURT: Someone has to help me refresh my  
14 recollection; I don't remember Mr. Barrett talking about  
15 fallout benefits.

00:06

16 MR. MURPHY: I believe he did, I think he did offer  
17 a chart into evidence that calculated fallout benefits.  
18 Again, he didn't say they were fallout benefits, he said he's  
19 not offering an opinion they are fallout benefits. What he  
20 did is use the methodology that kind of replicated -- he  
21 believes replicated the analysis that was done in 2005 or 2006  
22 and just used that math to come up with a new number for later  
23 years. He wasn't testifying it was a fallout benefit, he just  
24 did some math.

00:06

25 THE COURT: Oh, I remember that now. So he couldn't

00:06

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1 state whether they were fallout benefits or not, but he  
2 thought it was something that might be something like a  
3 fallout benefit.

4 MR. MURPHY: That's -- well, I don't think he even  
5 said that last part, your Honor. I asked him pretty clearly,  
6 are you an expert on fallout benefit, no; are you offering an  
7 opinion these are fallout benefits, no, was the trial  
8 testimony. And now Mr. Pomerantz wants to take that and say  
9 well, that's the fallout benefit, I'm then going to take that  
10 fallout benefit and say how much of that fallout benefit is a  
11 attributable to each fund. So it's just building on hearsay  
12 and it's precluded under this Court's prior ruling on his  
13 expertise.

14 MR. SWEETSER: Your Honor, Dr. Pomerantz is doing no  
15 such thing. All he's doing is taking the information, which  
16 is a summary of the number which is in evidence as 197-A, and  
17 taking --

18 THE COURT: A summary of a number; what is the  
19 number?

20 MR. SWEETSER: The number -- what's the specific  
21 number?

22 THE COURT: What does it represent, the number  
23 represent?

24 MR. SWEETSER: It represents Mr. Barrett's testimony  
25 on the general account and product wrapper calculations that



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1 he tried to assimilate to what the defendant was doing when it  
2 actually was reporting that number to the Board. What he did  
3 was project it out, because as your Honor will recall they  
4 stopped doing that in 2006; he projected it out to today's  
5 numbers and comes up with essentially 800,000 for one year, a  
6 million for each -- I'm sorry; a billion for each of the two  
7 subsequent years.

8 And all Dr. Pomerantz did and all this exhibit does  
9 is take that number and break it down in a way that he'll  
10 explain to the Court to the specific plaintiffs' funds,  
11 because that's information presumably if the Court finds if  
12 these are fallout benefits the Court would want to know how  
13 that number could be allocated to each of the funds.

14 It's nothing other than a mathematical calculation,  
15 taking an exhibit that's in evidence from Mr. Barrett and  
16 translating it into the breakdown to each of the 12 funds at  
17 issue in this case.

18 MR. MURPHY: Your Honor, I'm sympathetic to Mr.  
19 Sweetser's position. I think I understand what he wants to do  
20 is just do some math, and perhaps I can talk to him for a  
21 minute and work out some sort of compromise to get the math  
22 that he needs in evidence.

23 But what he's offering into evidence at 151-L is a  
24 fallout benefit analysis for each of the funds, it then labels  
25 the fallout benefit and has a number attached to it. I mean

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1 it goes far beyond what he's permitted to testify to.

2 If he wants to say I took a billion dollars which  
3 Mr. Barrett calculated is the product wrapper and general  
4 account and did some math and here are the numbers, I think I  
5 would allow that.

6 MR. SWEETSER: That's all he seeks to do. If  
7 counsel's concern is the labeling on this document of a  
8 fallout benefit, I certainly have no objection if counsel has  
9 a substitute word that he would like to use there to putting  
10 that in there to avoid this conflict.

11 MR. MURPHY: So is what --

12 THE COURT: I don't see why it's relevant. So far  
13 we haven't had any testimony or substantial testimony about  
14 what a fallout benefit is, and I've ruled that Mr. Pomerantz  
15 can't testify as to fallout benefits because he really doesn't  
16 possess any expertise in that field; and now you want me to  
17 accept numbers that might be, which I would say is  
18 speculative, representing fallout benefits. I don't  
19 understand why that's even relevant at this timeframe.

20 MR. SWEETSER: Let me address your Honor's concern.  
21 So fallout benefits are one of the *Gartenberg* factors. As  
22 your Honor may recall, I questioned Mr. Joenk extensively on  
23 this issue, among other things, inquiring as to why for  
24 several years FMG reported to the Board the product wrapper  
25 fees and the general account spread; not only reported that as

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1 a fallout benefit, but specifically attached the dollar value  
2 for each. And then they stopped doing that, which plaintiffs  
3 have obviously a serious concern about. They classified it as  
4 a fallout benefit for a substantial period of time and they  
5 stopped doing it and stop reporting it to the Board.

6 So that's the significance of the two items that are  
7 in Mr. Barrett's calculation of -- that's set forth in 197-A.  
8 And again, with respect to what Dr. Pomerantz did, the Court  
9 is -- it's obviously plaintiffs' position is that the Court is  
10 required -- the law requires each fund to be reviewed  
11 individually. And all we did to assist the Court in the event  
12 that the Court finds, which we believe we've established  
13 yesterday as a matter of law, that these two items, the  
14 product wrapper fees and the general account are fallout  
15 benefits; all this document does, all that Dr. Pomerantz did  
16 was take Mr. Barrett's calculation, and again, allocate to  
17 each of the funds so your Honor can know how this allocation  
18 translates to each of the funds at issue.

19 MR. MURPHY: Again, your Honor, so I believe he said  
20 he asked Mr. Joenk about fallout benefits, and my recollection  
21 was that you, your Honor, asked Mr. Joenk a question, you  
22 turned to him and said, are these fallout benefits; and he  
23 said absolutely not, and explained why the general account  
24 definitely wasn't and then explained product wrapper. So the  
25 only testimony to date is that they're not fallout benefits.

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1 Again, this witness has been precluded from  
2 testifying about it, and if it goes in, as with many of Mr.  
3 Pomerantz's calculations, there's a lot of numbers on here  
4 that I have to unpack; and I have eight days. I have a lot of  
5 problems with some of these numbers, he just rounds up Mr.  
6 Barrett's numbers with a precise number and says, oh why don't  
7 we just call at a billion, just call it a billion, don't worry  
8 about the exact number.

9 So it's just going to consume trial testimony that I  
10 think is totally unnecessary and there's no foundation for at  
11 this point.

12 MR. SWEETSER: Your Honor, first of all, he rounded  
13 down, so he benefited the defendant in what he did; he rounded  
14 down, he doesn't round up. And on the chance that the Court  
15 might reject Mr. Joenk's testimony about his self-serving  
16 opinion that these are not fallout benefits that they have  
17 continuously reported as fallout benefits, and even after they  
18 stopped reporting the dollar number from the Court, the Court  
19 may recall there's voluminous evidence that shows that they  
20 mentioned that it is a fallout benefit, then they changed the  
21 wording to it's possibly a fallout benefit; it's up to your  
22 Honor to decide from the evidence whether or not it's a  
23 fallout benefit.

24 But again, in the event that your Honor does decide  
25 that the product wrapper and/or general account fees are

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1 fallout benefits, this is a document again which I would think  
2 would be helpful to the Court because it takes Mr. Barrett's  
3 calculation of those two numbers which they stopped reporting  
4 in 2005/2006, he does the exact same calculation, he testified  
00:13 5 about how he did that; this document's in evidence, and all it  
6 does again is just translate that number to each of the funds  
7 so when your Honor's reviewing each of the funds on an  
8 individual basis you will have this information available to  
9 him.

00:13 10 THE COURT: The original request was that I -- what  
11 was your request that I do? Allow Dr. Pomerantz to discuss  
12 fallout fees?

13 MR. SWEETSER: Not at all. Just to explain what he  
14 did in P-151-L, just to explain to the Court essentially what  
00:13 15 I just explained to the Court; that he took Mr. Barrett's  
16 number, rounded them down, and just attributed the number to  
17 each of the funds based upon allocation that he will discuss  
18 with the Court if your Honor permits the testimony.

19 MR. MURPHY: I can tell your Honor's tiring of this  
00:14 20 issue, and if -- perhaps a compromise just to facilitate --

21 THE COURT: Oh no. I'm denying the application. It  
22 seems to me that -- I don't know if this came up in the  
23 testimony, but when Mr. Barrett was testifying about this, in  
24 my mind I was thinking that well, he's not saying it's a  
00:14 25 fallout benefit, but I thought -- and I can't remember from

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1 where, but I do believe that from the discussions amongst  
2 counsel and what was presented to the Court, that there was  
3 going to be testimony at some time in the future about fallout  
4 benefits that would match up or be a proffer of evidence --  
00:14 5 we'd allow the evidence in by Mr. Barrett because it would all  
6 be connected later in time with more information about fallout  
7 benefits.

8 But I denied Dr. Pomerantz to testify on that,  
9 because I didn't feel he had an expertise, and now we're just  
00:15 10 trying to augment really iffy material from Mr. Barrett based  
11 on what I thought was a proffer that there would be future  
12 fallout benefit testimony, and there's none. So, I don't see  
13 why I'm getting into this. So I'm denying the application.

14 MR. SWEETSER: And your Honor, I understand that.  
00:15 15 On that point, however, I would just point out as far as  
16 future testimony about this, it would seem that your Honor's  
17 ruling precluding Dr. Pomerantz from discussing this yesterday  
18 would preclude any witness from discussing this yesterday. My  
19 understanding of the Court's ruling yesterday is that --

00:15 20 THE COURT: The evidence yesterday dealt with Dr.  
21 Pomerantz. There's been no proffer by anyone from your team  
22 that there will be other evidence to support fallout benefits.  
23 So, if there's no testimony that's going to be forthcoming,  
24 then what am I hooking up in the future; there's nothing  
00:16 25 there. There's no way the connect it all up.

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1 MR. SWEETSER: And again, your Honor, I know it's  
2 been, you know, an enormous record that's before the Court and  
3 the Court may not recall, but there is a multitude of board  
4 materials every single year, fallout benefits are reported to  
5 the Board.

00:16

6 THE COURT: I know that.

7 MR. SWEETSER: Okay. And your Honor will recall  
8 that for several years these fallout benefits that are  
9 calculated -- that were calculated by Mr. Barrett were

00:16

10 reported by a number and then the defendants stopped reporting  
11 them.

12 THE COURT: I recall that.

13 MR. SWEETSER: Then, your Honor, also on the record  
14 are documents where FMG is reporting these benefits, first of  
15 all, as a fallout benefit, and then after that as a possible  
16 fallout benefit. So there is --

00:16

17 THE COURT: The testimony was, Mr. Sweetser, what I  
18 recall from Mr. Joenk was, I don't know whoever made them  
19 fallout benefits, they don't represent fallout benefits to me,  
20 and the burden of proof in this case is upon the plaintiffs,  
21 and you haven't shown any evidence. So I don't understand why  
22 I'd let it in this at this time.

00:17

23 MR. MURPHY: Your Honor, just one addition to that.  
24 Mr. Joenk said I have a strong suspicion as to why they were  
25 removed, and Mr. Sweetser didn't purposely ask the question.

00:17

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1 And again, he's got the burden of proof to lay a foundation,  
2 he could have asked the question, I think Mr. Joenk said twice  
3 I have a strong suspicion why they were removed and he didn't  
4 ask the question.

00:17 5 MR. SWEETSER: Your Honor, on that point I don't  
6 really particularly care why Mr. Joenk removed them, because  
7 the fact is -- and your Honor, I'm talking about beyond the  
8 testimony. I mean certainly Mr. Joenk isn't going to stand up  
9 and say these are absolutely fallout benefits and I didn't  
00:17 10 report a billion dollars of fallout benefits every year  
11 intentionally.

12 But again, all I'm going to do is remind the Court  
13 that putting aside his testimony, you know, the plaintiffs in  
14 this case have a difficult burden of having to put in their  
00:18 15 case through defense witnesses which is difficult. All that  
16 being said, the documents tell the story; the documents reveal  
17 these fallout benefits; the documents acknowledge FMG's  
18 position that at one point in time they are fallout benefits,  
19 and now they're possibly fallout benefits.

00:18 20 And again, the ultimate resolution of whether or not  
21 they're fallout benefits or not based upon what they are will  
22 be up to your Honor. That's why we believe this will be  
23 helpful to the Court.

24 THE COURT: Believe what?

00:18 25 MR. SWEETSER: We believe that the allocation --



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1 first of all, the calculation done by Mr. Barrett of the two  
2 biggest fallout benefits here, first, which is already in  
3 evidence; and Dr. Pomerantz's simple mathematic calculation  
4 allocating those to the individual funds at issue for the  
5 Court to analyze, if the Court determines that these are  
6 fallout benefits, will be of assistance to the Court. That's  
7 all this document is.

8 THE COURT: All right. So my ruling is as follows,  
9 in my view the plaintiff has the burden of proof to show what  
10 a fallout benefit is. And to date, the plaintiffs have not  
11 shown what a fallout benefit is in this case. The plaintiffs  
12 also are not proffering that other people or witnesses will  
13 demonstrate what a fallout benefit is.

14 As such, I don't see how putting in a mathematical  
15 sheet showing what the possible fallout benefits would be per  
16 each fund makes any sense at all. So, I'm denying the  
17 application. Go on to the next area.

18 MR. SWEETSER: Thank you.

19 BY MR. SWEETSER:

20 Q. I'd like to show you what's been marked as 151-J. Dr.  
21 Pomerantz, were you requested to provide any damages analysis  
22 in this case?

23 A. Yes.

24 Q. Can you please tell the Court what P-151-J is?

25 A. P-151-J is a damage calculation that I performed for the

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1 subject funds, for the three years identified, 2010 through  
2 2012.

3 Q. And this document says it's based on a 39 percent profit  
4 margin.

10:20 5 A. Yes.

6 Q. Correct? Why did you use a 39 percent profit margin?

7 A. There are two surveys, one conducted by Lipper and one  
8 conducted by Strategic Insight, that aggregate the information  
9 available from public mutual fund companies, and report in  
10:21 10 their survey a pre-tax margin, across not just each individual  
11 complex, but also for the group as a whole. And they offer 39  
12 percent as the average profit margin of that group.

13 Q. I'm going to show you what's been marked into evidence as  
14 P-164.

10:22 15 Do you have P-164?

16 A. Yes.

17 Q. Is this the -- first of all, what is Strategic Insights?

18 A. Strategic Insight is like I said a third-party  
19 organization that collects information from mutual fund  
10:22 20 companies, maintains databases of aggregate information, both  
21 pertaining to investments as well as the businesses, and  
22 serves as a -- I guess just a clearing house for a variety of  
23 mutual fund business information.

24 Q. Do you know if FMG provides Strategic Insight information  
10:22 25 to the Board?

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1 A. Yes, everybody does.

2 Q. I'm going to direct your attention to page 441 of P-164,

3 Bates ending 9079. Do you have that document?

4 A. Yes.

00:23 5 Q. Are on that page? Okay. If you look down the left-hand  
6 column about two-thirds of the way down the page, is that the  
7 information -- or at least I think you said you relied on  
8 Lipper as well as Strategic Insight; is that correct?

00:23 9 A. Lipper also has a survey that's pretty much the same as  
10 Strategic Insight.

11 Q. Okay. And down at the bottom where it says in 2012; do  
12 you see that?

13 A. Yes.

14 Q. And it's bolded?

00:23 15 A. Yes.

16 Q. It says in 2012 the average pre-tax operating margin for  
17 the public companies was 39 percent, slightly lower than the  
18 40 percent posted the year prior; is that correct?

19 A. Yes.

00:23 20 Q. Okay. Now, when it says public companies, to what  
21 companies does this survey apply?

22 A. I mean the survey applies to the industry, the  
23 information is only publicly available for public companies.

00:24 24 Q. Okay. When you say the industry, what industry are you  
25 referring to?

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1 A. The mutual fund industry.

2 Q. Okay. So, you've told us the basis for why you use the

3 39 percent profit margin. Now, can you explain to the Court

4 -- let's start with the top chart or the top table that you

00:24

5 have on P-151-J. Can you tell the Court what it is to -- what

6 it is you did to calculate the numbers that are set forth in

7 this chart.

8 MR. MURPHY: Just, your Honor, as I understand this

9 document --

00:24

10 THE COURT: So you're looking at 164?

11 MR. MURPHY: Sorry; I think he switched back to

12 151-J just now.

13 Am I correct, Mr. Sweetser?

14 MR. SWEETSER: Yes, 151-J.

00:24

15 MR. MURPHY: So 151-J purports to be a damage

16 calculation based on a 39 percent profit margin that I believe

17 Mr. Pomerantz calculated. So he's calculating a profit

18 manager. My client's been unable to replicate that number by

19 using his results to determine how he got to a 39 percent

00:25

20 profit margin. It's very clear he's including major

21 categories of expenses like sub-advisory fees and variable

22 expenses, but excluding -- sorry, variable expenses and

23 sub-advisory fees, but there's all kinds of adjustments,

24 accounting adjustments like offsets to revenues and fee

00:25

25 waivers, and we cannot figure out how he got these numbers.

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1           Essentially what he's doing is I've calculated what  
2 it means to have a 39 -- a hypothetical 39 percent profit  
3 margin. That would be squarely within Mr. Barrett's realm of  
4 expertise, but as I objected to yesterday, Mr. Pomerantz has  
00:25 5 no accounting expertise, he has no accounting degrees; he's  
6 never written any accounting articles that have been peer  
7 reviewed, and has no basis to go through a financial statement  
8 and contact a profit margin as an accountant would. They  
9 could have had Mr. Barrett do that and they chose not to do  
00:26 10 that.

11           THE COURT: Mr. Sweetser?

12           MR. SWEETSER: Your Honor, I'm not exactly sure like  
13 there was a question that he's objecting to, he's objecting to  
14 even this document being discussed at all. Counsel had a full  
00:26 15 opportunity -- this was in Dr. Pomerantz's report. Counsel  
16 deposed Dr. Pomerantz for several hours on whatever subject  
17 matter he wanted to depose him on. Dr. Pomerantz has a Ph.D.  
18 in mathematics from Berkley, he can certainly calculate a  
19 profit margin, and he was about to explain before I was  
00:26 20 interrupted how it is he did his calculation.

21           To the extent that the defendant can't figure it out  
22 or has issues with the way that he calculated the profit  
23 margin, they're certainly welcome to address that on  
24 cross-examination. But it's certainly something within his  
00:27 25 realm of expertise to look at numbers and calculate a profit

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1 margin based on those numbers.

2 MR. MURPHY: Your Honor, I did read his report, I  
3 did depose him and then I immediately moved to strike because  
4 he didn't have expertise as an accountant. I'm not sure what  
5 else I can do. As I understand the discussions we had  
6 yesterday and the testimony Mr. Pomerantz gave about his lack  
7 of accounting experience, he's calculating a profit -- that's  
8 what accountants do, that's the core of what they do; right?

9 So I don't understand why Mr. Barrett couldn't have  
10 done it, and I don't see what expertise Mr. Pomerantz has to  
11 calculate a profit margin that again is going to consume trial  
12 time because we can't even create how he got there.

13 THE COURT: I just gave everybody enough time for  
14 time on trial, so this idea that your objections are based on  
15 the amount of time we have, doesn't ring with me at the  
16 present time.

17 But generally, with regard to P-151-J, my  
18 recollection from yesterday was that I allowed Mr. Pomerantz  
19 to testify based on his experience in the industry, with both  
20 sub-advisors and companies like FMG, which are advisors, and  
21 he seemed to have substantial experience in that regard. And  
22 he is a mathematician, so -- and it's really not math that  
23 he's doing here, it's what is the appropriate formula that you  
24 would use to determine what the margins are and the profit is,  
25 which seems more like an accountant type of calculation.

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1 But here, based on Mr. Pomerantz's experience in the  
2 industry with regard to sub-advisors and advisors and  
3 companies like FMG, I think he's qualified to make this type  
4 of an opinion as to the damages. So, I'll allow it.

10:29 5 MR. SWEETSER: Thank you, your Honor.

6 BY MR. SWEETSER:

7 Q. Dr. Pomerantz, again, getting to the top table on the  
8 first page of P-151-J, will you please walk the Court through  
9 the process that you used in order to calculate these figures.

10:29 10 A. The data used to create these numbers is based upon  
11 what's offered in the profitability reports.

12 Q. So just to be clear on that so the Court's clear, we were  
13 discussing yesterday it's 52-B, the landscapes?

14 A. Yes.

10:29 15 MR. SWEETSER: Does your Honor need a copy of that  
16 or do you recall 52-B?

17 Tc: No, you can just go through this.

18 MR. SWEETSER: Okay.

19 BY MR. SWEETSER:

10:29 20 Q. So it's based on the landscapes that FMG itself prepares?

21 A. Yes. And the relationship between revenue and margin is  
22 a very simple formula.

23 Q. Can you tell the Court what that formula is?

24 A. And that formula is that the margin is equal to the  
10:30 25 revenue minus the cost, as a quantity, divided by the revenue.

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1 So, just as an example, if the revenue is 10 and the cost is  
2 3, then 10 minus 3 is 7, divided by 10 is 70 percent.

3 Q. So that's the basic formula that you used to calculate  
4 the numbers that are set forth in 151-J?

00:30 5 A. Yes.

6 Q. So again, understanding that's the formula, can you  
7 continue please to walk the Court through what you did.

8 A. So that's a formula that relates revenue to margin. The  
9 formula that -- the application of that to this problem is to  
10 utilize 39 percent as the target margin, and to calculate what  
11 should the revenue be, in order for that formula to produce a  
12 39 percent value as the margin.

13 I don't need to look at what the actual revenue is,  
14 even though that's on the report, I get to that at the second  
15 step; but the first step is to calculate what revenue would  
16 produce a value of 39 percent based on the cost assigned to  
17 the product. And for the cost I exclude the sub-advisory  
18 expense, and I similarly subtract that number from the  
19 revenue.

00:31 20 So I'm just looking at FMG's business, I'm not  
21 looking at the sub-advisor, I take that number out of revenue  
22 and I take that number out of cost.

23 Q. And explain to the Court why you did that.

24 A. Because that's not FMG's business, FMG's business is as  
00:32 25 we discussed the oversight of those sub-advisors and the



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1 creation of the product, and they do have costs that are  
2 associated with the 50 employees who are performing a variety  
3 of functions, and that's the cost for FMG to run their  
4 business. I'm not looking at the revenue of the sub-advisor,  
5 I'm not looking at the cost of the sub-advisor, including  
6 those numbers actually just serves to artificially lower the  
7 margin that is being earned on FMG's revenue and FMG's  
8 service.

9 Q. Okay. What I'd like to do --

10 MR. SWEETSER: Chris, can I ask you to show the  
11 witness 52-B?

12 Q. Just so we're crystal clear on what you did and what  
13 costs you used.

14 So, Dr. Pomerantz, if you would, let's find the Core  
15 Bond Index Fund and let's walk the Court through the numbers  
16 that you used to calculate your 39 percent profit margin and  
17 the damages attributable to that; okay? I've got that on  
18 Bates ending 4211, and it's about three-quarters the way  
19 across the page.

20 THE COURT: What page are you on?

21 MR. SWEETSER: Bates ending 4211, your Honor. The  
22 Core Bond Index, two-thirds across the page.

23 Q. Dr. Pomerantz, do you have that?

24 A. Yes.

25 Q. Okay. So again, can you please explain to the Court the

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1 numbers that you used to do your calculation on P-151-J.

2 A. So, the revenue that I'm concerned with is the 22.1

3 million, but I subtract from that the 1.06 million, and that

4 is FMG's revenue, for its service.

00:34

5 Q. All right. So when you say the revenue that you're

6 concerned with, the revenue -- the investment management fee

7 that's discussed in this top chart is under the bolded

8 revenues; right? And it's the first item, management fees;

9 right?

00:35

10 A. Yes.

11 Q. Then you go all the way across and you get to the 21 --

12 \$22.1 million that you were just speaking about.

13 A. Yes.

14 Q. Okay. Then can you please tell the Court what expense

00:35

15 you subtracted from that before you -- in order to do your

16 profit margin calculation?

17 A. Well, okay, as I said the sub-advisory fee is the 1.06

18 million.

19 Q. So now we're going a little bit further down the page

00:35

20 under variable expenses, and that's bolded?

21 A. Yes.

22 Q. And then it says the first item there is sub-advisor

23 fees, and then you just go all the way across under that same

24 column with the 22.1 million in investment management fees and

00:35

25 there's 1.06 million in the sub-advisory fee; is that correct?

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1 A. Yes.

2 Q. Okay. So you excluded that; and then what did you do?

3 A. So what I -- what I need to know is what are their costs  
4 of running the fund, and their cost is what we've called the  
5 total direct expense.

6 Q. Okay. And that's about halfway down the page?

7 A. Which is about halfway down the page for Core Bond Index,  
8 that's approximately \$864,000.

9 Q. And then what did you do?

10 A. And I calculate their margin by taking the revenue, which  
11 is approximately 21 million, subtracting the direct expense,  
12 and then dividing by the revenue, and if you do that you will  
13 not get 39 percent; you'll get what their actual profit margin  
14 is. But what I want to know is what revenue value will  
15 actually produce 39 percent in that formula.

16 Q. Okay.

17 A. And then I saw for what that revenue is, just following  
18 the formula. And then from the -- and then once I have that  
19 number I subtract it from what their actual 21 million of  
20 revenue is, to produce the damage number that is on 151-J.

21 Q. And the numbers listed here are, pursuant to that  
22 formula, the amount of money that would be paid back to the  
23 funds if the Court applied a 39 percent margin applying your  
24 methodology; is that correct?

25 A. Yes.

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1 Q. Now, let me ask you something about the direct expenses  
2 that you were just mentioning. I see under that there's  
3 administration and compliance discussed, did you use -- did  
4 you subtract the entire total direct expense or just the  
5 management aspect of the direct expenses?

6 A. To -- for the -- to calculate the management -- to do  
7 this calculation for the advisory fee I'm just looking at the  
8 management fee revenue and the sub-advisory fee revenue.

9 Q. Now, did you employ the same methodology for all three  
10 years at issue in this chart?

11 A. Yes.

12 Q. And would that same methodology apply to the years since  
13 2012 when you did this calculation?

14 A. I mean that's the methodology that I would use for any  
15 year.

16 Q. And then at the bottom it says, subject funds, bolded,  
17 and then there are numbers listed there; can you please tell  
18 the Court what those bolded numbers are at the bottom of the  
19 chart?

20 A. The bolded numbers are the totals for each of the  
21 respective years.

22 Q. So, this is what would be paid back to the funds in the  
23 event that the Court applied a 39 percent profit margin; is  
24 that correct?

25 A. Yes.

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1 Q. Can you please tell the Court what the bottom chart on  
2 this page is?

3 A. The bottom chart does the same calculation, but for the  
4 administrative fee, but similarly eliminates the -- the  
5 sub-administrator payment.

6 Q. So, the sub-administrator being JP Morgan, you eliminated  
7 its --

8 A. Yes.

9 Q. The payment to JP Morgan?

10 A. Yes. I would eliminate that as a revenue item and as a  
11 cost.

12 Q. And why would you do that?

13 A. For the same reasons that -- those numbers belong to JP  
14 Morgan, it's what -- it's their business, doesn't have to do  
15 with FMG's business, and it artificially lowers the margin if  
16 you do include them.

17 Q. What expenses did you include in calculating the  
18 administration profit margin at 39 percent?

19 A. Well, there you're looking at third-party administrative  
20 charges, there's a line item for fixed and variable, as  
21 basically being payments made to the sub-advisor.

22 Q. If we flip the page of P-151-J, can you please tell the  
23 Court what that chart is?

24 A. This chart just combines -- just combines the two.

25 Q. The two prior charts?

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1 A. Yes.

2 Q. And then at the very bottom you've got, subject funds,  
3 not bolded this time, but you've got for example for 2012,  
4 \$147.2 million; do you see that?

00:41 5 A. Yes.

6 Q. If the Court applied a 39 percent profit margin to both  
7 the investment management fees and administration fees  
8 collected from plaintiffs' funds, is that the total amount of  
9 damages for that year?

00:41 10 A. Yes.

11 Q. And again the same process could be applied for  
12 subsequent years; correct?

13 A. Yes.

14 MR. SWEETSER: Your Honor, I move P-151-J into  
00:41 15 evidence.

16 THE COURT: Any objections?

17 MR. MURPHY: No objection.

18 THE COURT: All right. So P-151-J is admitted.

19 (Plaintiff's Exhibit 151-J was marked into  
00:41 20 evidence.)

21 BY MR. SWEETSER:

22 Q. Dr. Pomerantz, I'm now going to show you what's been  
23 marked as P-151-K. Dr. Pomerantz, do you have that?

24 A. Yes.

00:42 25 Q. Okay. P-151-K is comprised of three pages; did you

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1 prepare this document?

2 A. Yes.

3 Q. Can you please tell the Court generally what it is? And  
4 then I'm going to ask you some specific questions about it.

10:42 5 A. Well, each page corresponds to a different year, 2010,  
6 2011 and 2012. 2012, if we look at that page, there are  
7 columns and the columns just identify different target  
8 margins. What we were talking about on 151-J was assuming a  
9 39 percent profit margin. What I've done on 151-K is the same  
10:43 10 calculation, same methodology, only here I don't have a target  
11 margin of 39 percent, I have target margins of 50, 60, 70, 80  
12 and 90 percent.

13 Q. Why did you use those target margins?

14 A. Just to give a sense of what the excess fee is, being  
10:43 15 paid by the investors at a range of different margins.

16 Q. Was this just to give the Court options in the event that  
17 the Court determine another profit margin should apply, or did  
18 you take this from some Lipper or Strategic Insight data?  
19 Like how did you come up with these ranges?

10:43 20 A. Primarily to illustrate to the Court what the damages  
21 would be at different margins. As I understand it, it's  
22 ultimately the Court's decision of what is an appropriate  
23 margin.

24 Q. Okay. And again, at the very bottom next to subject  
10:44 25 funds, you've got totals. So at that total for all the funds

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1 combined is the number that the Court would award if the Court  
2 deemed the profit margin to be applicable to this case; is  
3 that correct?

4 A. Yes.

00:44 5 Q. Now, is this for both the management and administration  
6 fees, or is it only for the management fees?

7 A. This is just for the investment management fee.

8 Q. And again, presumably if the Court wanted a range of  
9 profit margins to apply to a damage calculation, the Court  
00:44 10 could do it the same way that you've discussed, you prepared  
11 this and the prior exhibit; correct?

12 A. Yes.

13 Q. Now, for 2012, if FMG were paid half the fees that it  
14 received, have you calculated what profit margin that would  
00:44 15 fall into?

16 THE COURT: Could you repeat that question?

17 MR. SWEETSER: Sure, your Honor, maybe to  
18 crystallize this; Chris, can I have 151-A, please.

19 THE WITNESS: I have it.

00:45 20 MR. SWEETSER: Does your Honor have it?

21 THE COURT: I have it.

22 MR. SWEETSER: Thank you.

23 BY MR. SWEETSER:

24 Q. Dr. Pomerantz, my question to you is this, if you look at  
00:46 25 the bottom of 151-A which is already in evidence, you've got



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1 the total amount of fees paid just for the subject funds in  
2 this case, to be \$124.6 million; do you see that?

3 A. Yes.

4 Q. Half of that is \$62.3 million; right?

00:46 5 A. Yes.

6 Q. My question to you is if FMG was paid \$62.3 million, half  
7 of what it was paid in 2012, what profit margin would that  
8 fall into?

00:46 9 A. Well, you can tell from P-151-K that that would be  
10 approximately 80 percent.

11 MR. SWEETSER: Your Honor, move P-151-K into  
12 evidence.

13 THE COURT: Any objections?

14 MR. MURPHY: No, your Honor.

00:46 15 THE COURT: So, admitted.

16 MR. SWEETSER: Thank you, your Honor.

17 (Plaintiff's Exhibit 151-K was marked into  
18 evidence.)

00:46 19 MR. SWEETSER: That concludes plaintiff's direct of  
20 Dr. Pomerantz.

21 THE COURT: All right. Cross?

22 MR. MURPHY: Yes, your Honor.

23 THE COURT: So, Mr. Murphy, if it's going to take a  
24 while to set up, we can break and come back?

00:47 25 MR. MURPHY: It's up you, your Honor, I'm ready, but

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1 now's a good as time as any but if you want to just go a half  
2 hour or something it's up you, I can go for a half hour if  
3 you'd rather break then, if you want to break now --

4 THE COURT: Let's go for a half hour and then we'll  
5 break.

6 MR. MURPHY: Okay.

7 (CROSS-EXAMINATION OF STEVE POMERANTZ PH.D. BY MR. MURPHY:)

8 Q. Good afternoon, Mr. Pomerantz. You're a professional  
9 expert; that's correct?

10 A. Yes.

11 Q. And about 90 percent of your income is from acting as an  
12 expert witness?

13 A. Yes.

14 Q. And you understand this is a Section 36(b) case?

15 A. Yes.

16 Q. And how many times have you been retained as an expert in  
17 a 36(b) case against a mutual fund advisor?

18 A. As a testifying expert? Two dozen.

19 Q. Okay. All for the plaintiff?

20 A. Yes.

21 Q. And you've had your deposition taken in a case against  
22 Harris Associates?

23 A. Yes.

24 Q. Waddell & Reed?

25 A. Yes.

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**1** Q. American Century?

**2** A. Yes.

**3** Q. Fiduciary?

**4** A. Yes.

10:48

**5** Q. Janus?

**6** A. Yes.

**7** Q. Franklin?

**8** A. Yes.

**9** Q. Federated?

10:48

**10** A. Yes.

**11** Q. Artisan?

**12** A. Yes.

**13** Q. Hartford?

**14** A. Yes.

10:48

**15** Q. Russell?

**16** A. Yes.

**17** Q. Principle --

**18** A. No, not in Russell.

**19** Q. Fair enough; I think we're meeting in a week or two.

10:48

**20** Principal?

**21** A. That's happening during this trial in my mind.

**22** Q. Principal?

**23** A. Yes.

**24** Q. And where you were deposed those were all under oath;

10:49

**25** correct?

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1 A. Yes.

2 Q. So let's talk about your opinions in this case. Your  
3 opinion is that FMG's really not doing anything; correct?

4 A. I think my opinion is that the bulk of the services are  
5 being performed by the sub-advisor, and that FMG's  
6 compensation is not commensurate with the services that it  
7 provides.

8 Q. But when you testified at your deposition I asked you  
9 what is your understanding of the split of services, you said  
10 FMG is not really doing anything; is that correct?

11 A. If those were my words that's accurate.

12 Q. And you believe that FMG is just hiring managers,  
13 monitoring them and then acting as a conduit to the Board;  
14 correct?

15 A. I'm sorry; hiring managers?

16 Q. Hiring managers, monitoring managers and being a conduit  
17 to the Board; that was what you said at your deposition?

18 A. And a couple of other services that I could identify.

19 Q. So the only other services that you could identify were  
20 they probably provide some office space and some coffee cups  
21 to sub-advisors when they come to visit FMG's office; is that  
22 the only other thing you could identify?

23 A. I mean they're responsible for printing a prospectus.

24 Q. You didn't list that in your deposition, did you?

25 A. You know, Sean, I can probably if I thought about it give

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1 you a long list --

2 THE COURT: Wait; you have to answer the question.

3 The question was, Mr. Murphy?

4 MR. MURPHY: Why don't we just play clip 140.

00:50 5 (Portion of videotaped deposition played of Steve  
6 Pomerantz.)

7 Q: Other than the hiring --

8 (Portion of videotaped deposition stopped.)

9 MR. SWEETSER: Your Honor, I object. I don't know  
00:50 10 what the question is that presumably this is intended to test  
11 his credibility --

12 THE COURT: Frank, can you repeat the question that  
13 was asked by Mr. Murphy?

14 (Question read back by the reporter.)

00:51 15 MR. MURPHY: So, your Honor, he's now saying I could  
16 provide a whole bunch of services; I asked him at his  
17 deposition -- I can impeach him with a prior inconsistent  
18 statement from his deposition under 801(d)(1)(A).

19 THE COURT: You may.

00:51 20 MR. MURPHY: Can I play clip 140, which is AXA  
21 transcript page 9.

22 (Portion of videotaped deposition played of Steve  
23 Pomerantz.)

24 Q: Other than hiring, firing and monitoring of  
00:51 25 managers, and being a conduit to the Board, are they

Pomerantz - Cross - Murphy

1 responsible for any other services?

2 A: There might be some ancillary de minimus

3 services that they perform.

4 Q: And what ancillary de minimus services are you

00:51 5 aware of?

6 A: They will make presentations to the Board.

7 Q: Anything else you can think of?

8 A: Nothing significant.

9 Q: Anything insignificant?

00:52 10 A: They probably provide some office space and

11 coffee cubs to sub-advisors who come in to visit

12 their office.

13 Q: Anything other than office space and coffee cups

14 to sub-advisors?

00:52 15 A: Nothing significant that I can think of.

16 Q: Anything insignificant that you can think of?

17 A: No.

18 (Portion of videotaped deposition concluded.)

19 BY MR. MURPHY:

00:52 20 Q. Were you asked those questions and gave those answers,

21 Mr. Pomerantz?

22 A. I think you should play the seven and a half hours of

23 other deposition testimony.

24 Q. Answer the question --

00:52 25 A. It contains other things that I discussed --

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1 THE COURT: Mr. Pomerantz, you have to answer the  
2 question, sir. Okay? Do you understand that?

3 THE WITNESS: Yes.

4 THE COURT: All right. Thank you.

00:52 5 BY MR. MURPHY:

6 Q. Were you asked those questions and gave those answers at  
7 your deposition, Mr. Pomerantz?

8 A. The tape speaks for itself.

9 Q. Is that a yes?

00:53 10 A. If the tape is accurate, then yes.

11 Q. In terms of FMG's research of hiring new managers, you  
12 believe that FMG uses the Sunday business section of the New  
13 York Times; correct?

00:53 14 MR. SWEETSER: Your Honor, I object. This is  
15 outside the scope of any opinion he was permitted to testify  
16 to. I wasn't permitted to probe with him hiring of  
17 sub-advisors, and there have been no sub-advisors hired for  
18 the plaintiffs' funds in the years in question. But this  
19 wasn't an opinion that he gave.

00:53 20 THE COURT: All right, overruled.

21 You may answer the question.

22 BY MR. MURPHY:

00:53 23 Q. I'll repeat the question, Mr. Pomerantz. In terms of  
24 FMG's research to identify new sub-advisors, you believe they  
25 use the Sunday business section of the New York Times and just

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1 identify well-known managers; is that correct?

2 A. I believe FMG performs due diligence, there's been  
3 evidence of other due diligence that they performed. I don't  
4 doubt they read the Sunday paper, but I would say that there  
5 are plenty of other things that they do as part of their due  
6 diligence.

7 MR. MURPHY: If you could play clip 61, which is AXA  
8 transcript 194, starting at line 12.

9 (Portion of videotaped deposition played of Steve  
10 Pomerantz.)

11 Q: Do you know FMG does when it researches new  
12 managers?

13 A: I could not give you an exhaustive list of the  
14 things that they do. It seems like they just open  
15 up the Sunday business section of the New York Times  
16 basically and identify well-known managers.

17 (Portion of videotaped deposition concluded.)

18 BY MR. MURPHY:

19 Q. Were you asked those questions and gave those answers,  
20 Mr. Pomerantz?

21 A. Yes.

22 Q. And you understand that FMG does a volatility overlay  
23 over some of the funds?

24 A. They do something that they call a volatility overlay,  
25 but I mean -- you're going to have to define that if you want



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1 me to agree that that's what they do.

2 Q. So you don't know if there's -- if FMG offers a

3 volatility overlay over two of the funds?

4 A. They -- they -- as I testified yesterday, I believe that

00:55 5 they meddle with the funds, and exercise something that they

6 call an ATM strategy.

7 Q. Okay. And you believe a secretary could do that work;

8 correct?

9 A. I -- to the extent that anything's being done I think a

00:55 10 computer could probably do it very very easily.

11 Q. And you said a computer and a secretary is all that's

12 needed; correct?

13 A. In point of fact, when I was at Weiss, Peck and Greer we

14 had clients for whom we had overlay strategies similar to what

00:55 15 you're discussing, and in point of fact my secretary was

16 responsible for running a report at the end of every day that

17 would basically instruct me, and other members of the firm

18 about what was needed to be done as part of that "overlay

19 strategy."

00:56 20 MR. MURPHY: Can you play clip 67, which is AXA page

21 216, line 13.

22 (Portion of videotaped deposition played of Steve

23 Pomerantz.)

24 Q: Do you recall reviewing testimony that it was in

00:56 25 fact a manual process by FMG to measure volatility?

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1 A: Okay, any process that could be done manually is  
2 absolutely meaningless. The calculations that are  
3 being discussed here are incredibly complicated,  
4 incredibly complicated, and have to be done by a  
5 computer. Anything, anything that could be done  
6 manually is either something that can be done by a  
7 secretary, or something that does not need to be  
8 done and most likely shouldn't be done. And as I  
9 said, this testimony is incredibly vague in terms of  
10 what it is that's really happening. So, my opinions  
11 are based upon looking at the annual reports, seeing  
12 what's actually happening; I have seen communication  
13 between AXA and the sub-advisors about what it is  
14 they want people to do. You know, when he says it  
15 is a manual process, I don't think anybody at this  
16 table knows what it is referring to.

17 (Portion of videotaped deposition concluded.)

18 BY MR. MURPHY:

19 Q. Were you asked those questions and gave that answer at  
20 your deposition, Mr. Pomerantz?

21 A. Yes.

22 Q. And your opinion is that FMG doesn't play any role in the  
23 pricing of securities; is that correct?

24 A. Well, that's primarily an administrative task. I think  
25 if there were conflicts or difficult securities, FMG is

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1 ultimately responsible. So somebody at FMG would have to  
2 intervene if there were a conflict or something difficult.

3 MR. MURPHY: If you could play clip 54, which is AXA  
4 transcript 162, line 5.

10:57 5 (Portion of videotaped deposition played of Steve  
6 Pomerantz.)

7 Q: Does FMG play any role in the pricing of  
8 securities?

9 A: No, they would delegate that responsibility to  
10:58 10 ultimately the sub-administrator/sub-advisor.

11 (Portion of videotaped deposition concluded.)

12 BY MR. MURPHY:

13 Q. Did you give that answer at your deposition?

14 A. Yes, if I -- the securities held by these funds are all  
10:58 15 public bonds, public stocks, I didn't see anything that was  
16 controversial, I didn't see anything that wouldn't be  
17 processed by a sub-administrator or a sub-advisor as just the  
18 normal course of business.

19 Q. So you went in and looked at -- for example, how many  
10:58 20 securities does a Core Bond fund have?

21 A. The funds hold thousands of securities.

22 Q. Right. The Core Bond has 3,500 securities?

23 A. It might.

24 Q. And is your testimony that you went in and looked at  
10:58 25 those 3,500 and you think they're all just pull the number off

Pomerantz - Cross - Murphy

1 the tape, is that your testimony?

2 A. I don't think there's anything in that annual report that  
3 is out of the ordinary or complicated.

4 Q. And your position is that even -- even if AXA hadn't  
5 delegated all the responsibility for pricing securities,  
6 there's no one at AXA that could even price the securities;  
7 right?

8 A. Well, as I said, it can happen that there arises a  
9 conflict just in terms of the industry. It can -- it can  
10 happen that a conflict arises or uncertainty arises, or  
11 there's a difficulty that's involved; and ultimately FMG is  
12 responsible for resolving that dilemma.

13 So if something like that happens, and I don't know --  
14 I have no evidence that that has happened, but if it happens,  
15 then FMG would have to be responsible.

16 Q. But my question was, you believe that nobody at AXA is  
17 even in a position to determine the value of the securities;  
18 correct?

19 A. I don't think -- I don't think any of the employees --  
20 any of the 50 employees, I don't believe any of them is  
21 capable. They would be responsible for making a decision, but  
22 it's not like any of them are traders in any of the markets  
23 that understand a difficult situation. They'll make the  
24 decision and they'll make it as best as they can, but it's not  
25 like somebody at FMG is going to build a model to evaluate

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1 some complicated security that befuddles the  
2 sub-administrator.

3 MR. MURPHY: Can we play clip 172, which is AXA  
4 transcript 180, at line 2, for the record?

01:00 5 (Portion of videotaped deposition played of Steve  
6 Pomerantz.)

7 Q: I'll read it into the record again: Question,  
8 if there's a security that's difficult to price, who  
9 makes the determination to your knowledge about how  
10 to price it? Answer: AXA does.

01:00 11 Do you believe that testimony is false?

12 A: I don't know what how means, okay? Is it AXA's  
13 responsibility? Are they the ones who are legally  
14 responsible for the actual value of the security  
01:00 15 that's listed? Yes, it's their legal

16 responsibility. Does AXA price the security? You  
17 know, maybe I'm using a term of art that you're not  
18 familiar with; okay? But to say that someone prices  
19 a security means that they are the ones who put  
01:01 20 forth the investigation and the analysis to  
21 determine what is the fair value of the security.  
22 That is not something that AXA is doing.

23 Q: What don't you understand about the word how in  
24 that sentence?

01:01 25 A: I don't believe that AXA is in the position to

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1 determine that the value of the security. So, you  
2 know, I guess it depends how you define the word  
3 how. But if AXA -- I mean if the way that AXA does  
4 it is by deferring to the sub-advisor, then yes,  
5 that's how AXA does it, AXA does it by deferring it  
6 to the sub-advisor.

7 (Portion of videotaped deposition concluded.)

8 BY MR. MURPHY:

9 Q. Was that your testimony, that AXA you said "I don't  
10 believe that AXA's in a position to determine the value of the  
11 security", was that your testimony?

12 A. Yes.

13 Q. And did you investigate, for example, Ken Kozlowski, the  
14 portfolio manager's funds, did you look at his bio?

15 A. Yes.

16 Q. And you think he's not in a position to value securities?

17 A. The valuation of a security that really requires  
18 valuation requires a team of people, requires computer  
19 systems; no individual is going to make that determination.

20 There's nobody, there's not a single individual who is going  
21 to make that determination. They're going to rely upon  
22 pricing models and systems and third-party intelligence. I  
23 don't disagree that he might ultimately be responsible, but  
24 he's not the one who's actually going through the process of  
25 determining a valuation.

Pomerantz - Cross - Murphy

1 Q. And in fact, FMG has a valuation committee with five  
2 people that sit on it?

3 A. Yes.

4 Q. And they meet every day?

01:02 5 A. I don't know how often they meet.

6 Q. Well, did you do any investigation into that?

7 A. I've never been to their offices so I don't know what  
8 they're doing.

9 Q. Did you read any deposition testimony about it?

01:03 10 A. I know that they have a valuation committee.

11 Q. And you can't -- you can't tell me whether the five  
12 people in the valuation committee are capable of making  
13 pricing decisions; correct?

14 A. The pricing decisions that would need to be made by AXA  
01:03 15 as I just testified require significant allocation to systems,  
16 pricing models, computer models; I haven't seen those  
17 resources inside FMG itself to do that. So, I don't deny  
18 there's a pricing committee and five people can sit and make a  
19 decision, and I understand that they make the decision, it's  
01:03 20 their responsibility, but they're not people who are actually  
21 designing a model and developing a price for a security.

22 MR. MURPHY: Could I get clip 58, which is AXA  
23 transcript 186, line 13?

24 (Portion of videotaped deposition played of Steve  
01:03 25 Pomerantz.)

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1 Q: My question was, do you have an opinion as to  
2 whether the five people that sit on the valuation  
3 committee, are capable of making pricing decisions?

4 A: I don't know what you mean by capable, I don't  
5 know what you mean by decisions. In other words,  
6 can they arbitrate between --

7 Mr. Sweetser: Stop, stop, stop, stop. If you let  
8 Sean know you don't understand the question he'll  
9 rephrase it if he wants to.

10 Q: Well, what don't you understand about the word  
11 capable?

12 A: I don't know what capable means. I mean capable  
13 as if -- like if you asked me here's a security,  
14 here's a security, Steve, here's a prospectus, are  
15 you capable of telling me the fair value of that;  
16 right? Is that the question? Well, no, there's --  
17 I will have to defer the someone, I will have to  
18 defer to the sub-advisor to tell me what the price  
19 is.

20 Q: And what don't you understand about the word  
21 decisions?

22 A: Have I not answered your question?

23 Q: No, you said you don't -- let me read it back,  
24 you said I don't know what you mean by capable.

25 A: Yeah, I don't know what you mean by capable.



Pomerantz - Cross - Murphy

1 Q: Can I just get a question out, Steve? I don't  
2 know what you mean by capable, I don't know what you  
3 mean by decisions; my question is what don't you  
4 understand about the word decisions?

01:05

5 (Portion of videotaped testimony stopped.)

6 MR. SWEETSER: Your Honor, this is going far afield  
7 of crossing on the question at issue talking about what is his  
8 understanding of decisions is. We're talking about his  
9 understanding of what the valuation committee means, now

01:05

10 there's this colloquy going back and forth; you know, I object  
11 to the use of the deposition to that extent.

12 MR. MURPHY: Your Honor, it goes to credibility.

13 I'm asking him questions about what FMG does and he refused to  
14 answer them at his deposition. He said we don't do anything,

01:05

15 I asked him repeatedly do they do this, do they do that, and  
16 he just played word games, he asked me 40 times what I meant  
17 by the word blank and blank; it goes to credibility.

18 THE COURT: Overruled.

19 BY MR. MURPHY:

01:05

20 Q. Compliance, Mr. Pomerantz, your opinion is that all of  
21 the compliance for the fund is done by JP Morgan; correct?

22 A. JP Morgan as the sub-administrator performs a lot of  
23 compliance --

24 Q. I'm sorry --

01:06

25 A. -- responsibilities. There are other items that fall

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1 under the rubric of compliance.

2 Q. I'm sorry; you said a lot. Isn't it -- isn't your  
3 opinion that all compliance for the fund is done by JP Morgan?

4 A. I -- I think you have to define what you mean by  
5 compliance.

6 MR. MURPHY: Can you play clip 81, which is AXA  
7 transcript --

8 MR. SWEETSER: Your Honor, I object. The witness  
9 has said he doesn't know what -- what he means by the word  
10 compliance. We had this issue on direct with regard to  
11 compliance, he wasn't allowed to talk about compliance, and  
12 now we're going to the videotape without even figuring out  
13 what the word compliance means that he hasn't answered the  
14 question to.

15 Again, I object. This is a canned presentation,  
16 they've got all these things up there, I can't find see what  
17 going on, but this compliance issue's a clear one where again,  
18 let's go to the videotape, he doesn't even understand what  
19 the -- what Sean means by the question with respect to  
20 compliance.

21 THE COURT: Frank, what was the question?

22 (Question read back by the reporter.)

23 MR. MURPHY: And your Honor, so I asked him this  
24 exact same question at his deposition and he said yes, it  
25 was -- JP Morgan did it all. 801(d)(1)(A) on a prior

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1 inconsistent sworn statement is not limited to yes/no. It's  
2 if he gives an evasive answer and there's a very black and  
3 white one at his deposition you're allowed to impeach him with  
4 it.

01:07 5 MR. SWEETSER: And your Honor, there is no white and  
6 black answer here, he's asking Mr. Murphy what he means by the  
7 word compliance.

8 MR. MURPHY: Then he can redirect --

9 THE COURT: Overruled.

01:07 10 MR. MURPHY: Thank you, your Honor.

11 Clip 81, which is AXA transcript 251?

12 (Portion of videotaped deposition played of Steve  
13 Pomerantz.)

14 Q: And your understanding is that JP Morgan is  
01:07 15 providing all of the compliance services.

16 A: Yes.

17 (Portion of videotaped deposition concluded.)

18 BY MR. MURPHY:

19 Q. And for that opinion -- I'm sorry; do you recall being  
01:07 20 asked that question and giving that answer?

21 A. I recall that three second clip of an eight hour  
22 deposition.

23 Q. Okay. And in terms of your opinion about who's doing all  
24 the compliance, you're not relying on sworn testimony from JP  
01:08 25 Morgan and FMG for that; correct?

Pomerantz - Cross - Murphy

1 A. I know how the business operates, I know what JP Morgan  
2 is doing, I know what FMG is doing. And, again, I think we  
3 actually talked about this yesterday, there are lots of things  
4 that fall under the rubric of compliance.

01:08

5 Q. And you understand that FMG has 17 legal and compliance  
6 professionals just at FMG, not including AXA?

7 A. I don't recall if it was seven or 17. But there was a  
8 seven, yes, I recall something like that.

9 Q. Do you know what those individuals do?

01:08

10 A. No.

11 Q. But you're sure they're not doing compliance?

12 A. As I said Sean, probably for the sixth time, compliance  
13 means lots of things. There are some things that they're  
14 incapable of doing, as part of what I understand compliance to  
15 be. There are probably a lot of things that they're doing  
16 that fall under your definition.

01:09

17 Q. And you're aware that there's a pretty broad set of laws  
18 and regulations that govern mutual funds?

19 A. Yes.

01:09

20 Q. Do you know if mutual funds are one of the most heavily  
21 regulated securities in the marketplace?

22 A. I would say not heavily enough, but -- as evidenced by a  
23 lot of failures, but I agree with you that they are regulated.

24 Q. When you say there's a lot of failures, the compliance is  
25 a pretty important function?

01:09

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1 A. Insider trading is a failure; late trading is a failure  
2 of compliance.

3 Q. In fact, you wrote an article, didn't you, that said "no  
4 issuer of securities is subject to more detailed regulation  
5 than a mutual fund; is that correct?

6 A. Yes.

7 Q. I'm sorry?

8 A. Yes.

9 MR. MURPHY: Your Honor, I'm going to move to a new  
10 topic, do you --

11 THE COURT: Let's break here, and we'll come back at  
12 quarter to 2:00.

13 MR. MURPHY: Thank you, your Honor.

14 THE COURT: All right, thank you.

15 (Recess.)

16 THE COURT: Mr. Pomerantz, you may take the stand.

17 And Mr. Pomerantz, you're still under oath.

18 You may proceed, Mr. Murphy.

19 MR. MURPHY: Thank you, your Honor.

20 Can I call up P-151-I?

21 BY MR. MURPHY:

22 Q. And Mr. Pomerantz, let me know if you need it. I only  
23 just confirm this is your chart. Would you like to see a hard  
24 copy?

25 A. No, I can --

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1 Q. I just want to understand, this is -- we spent a lot of  
2 time on this yesterday so I don't want to dwell on it, but --  
3 so the performance versus the benchmark here, you show loss, I  
4 think everyone understands that the loss is kind of a -- not  
5 necessarily a "loss", but it's the difference between how the  
6 benchmark returned and the fund performed; correct?

7 A. Yes.

8 Q. And the benchmark -- the performance v. benchmark column,  
9 that's against the funds kind of prospectus benchmark?

10 A. For the most part it's the benchmark that's identified.

11 Q. In P-74.

12 A. Yes, yes.

13 Q. And so what's the benchmark, for example, for the Large  
14 Cap Value PLUS Fund; do you recall?

15 A. For the PLUS Funds in most cases I think I used the -- it  
16 would have been an underlying Russell or --

17 Q. Is it the Russell Growth 1000?

18 A. It's probably the Russell Value 1000; I think for one of  
19 the PLUS Funds actually on that -- on that exhibit there are  
20 actually two benchmarks that are identified that correspond to  
21 funds for the volatility managed products, there are two  
22 benchmarks and one is the Russell -- the appropriate Russell  
23 category in this case, I guess it's the 1000 value, and there  
24 also would have been kind of a customized index that FMG  
25 created that's kind of a volatility adjustment. And I think

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1 in one case I think I would have used the volatility adjusted  
2 benchmark they reference, and then in the other cases I was  
3 using the Russell benchmark.

02:02 4 Q. Right. So what you did is there were two benchmarks, and  
5 sometimes you used the prospectus benchmark and sometimes you  
6 used a volatility benchmark; correct?

7 A. I think in almost all cases I used the prospectus  
8 benchmark. In one example I believe the prospectus benchmark  
9 offered the same exact performance as the Lipper peer group  
02:02 10 benchmark, and so there I deferred to whatever the other  
11 benchmark was.

12 Q. So you didn't necessarily choose the prospectus  
13 benchmark, you chose which of those two you thought might work  
14 better; correct?

02:02 15 A. No, I -- my preference was to choose the prospectus  
16 benchmark, which I did in almost all cases, there were a  
17 couple where the prospectus benchmark was the same as -- the  
18 performance versus the prospectus was the same as the  
19 performance versus the peer group, so I chose the other  
02:03 20 benchmark to get more information about performance.

21 Q. If it performed not as well. You wouldn't use the  
22 performance versus the prospectus benchmark if it was the same  
23 as Lipper, to get more information you'd choose a much lower  
24 benchmark; is that fair?

02:03 25 A. No, it's not. My selection criteria was to use the

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1 Russell benchmark except in cases where the Russell return was  
2 the same as the peer group, and then I would defer to the  
3 other one and sometimes it would be higher and sometimes it  
4 would be lower.

02:03

5 Q. Okay. So -- why don't we take an example. So if we can  
6 call up P-74, which is your source document.

7 So this is the -- this is the Lipper Large Cap Value,  
8 so on this one, you see the funds' benchmark was the Russell  
9 1000 Value; do you see that?

02:04

10 A. Yes.

11 Q. And the five year return was negative 3.59.

12 A. Yes.

13 Q. And that's the number you would use to calculate the  
14 performance return versus the benchmark?

02:04

15 A. In all cases -- or in most cases, I would use the  
16 Russell; in this case I believe I used the alternative index  
17 only because it was substantially different from the Russell,  
18 which is virtually the same as the Lipper.

02:04

19 Q. So, to just get some variety you thought you'd choose a  
20 benchmark that had a much better return to compare the funds  
21 to; is that fair?

22 A. No, it's not, as I said a minute ago, I wasn't motivated  
23 by the fact that the other index was better or worse, I just  
24 thought it was different.

02:05

25 Q. So -- and we can go through every one, but for every



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1 single one you used the prospectus benchmark, except for this  
2 one (indicating) where if you'd used the prospectus benchmark,  
3 it would have eliminated about half the losses; correct? If  
4 you used the prospectus benchmark, half the losses that you  
02:05 5 show on your chart of losses would be eliminated if you used  
6 the prospectus benchmark like you did for every fund; correct?  
7 A. For that particular fund, yes.  
8 Q. Okay. Let's go back to P --  
9 A. In fact you can interpret exactly what it would be by  
02:05 10 just looking at the Lipper column for the Large Cap Value,  
11 because the return of the benchmark used in that calculation  
12 would be the same as the performance for the Russell  
13 calculation.  
14 Q. Right. So let's look at that. Let's go back to P-151-J.  
02:05 15 MR. MURPHY: If you can blow up the -- sorry; that's  
16 somehow damages. I'm looking for I; sorry.  
17 Pull up that again on the left.  
18 BY MR. MURPHY:  
19 Q. So on this one, Large Cap Value PLUS, if you used Lipper  
02:06 20 you show 551 million; correct?  
21 A. Yes.  
22 Q. And so if you used -- roughly that same number you would  
23 have used the same number on the right; correct?  
24 A. Yes.  
02:06 25 Q. And on the right with this other benchmark, the only time

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1 you used this other non-prospectus benchmark you're able to  
2 show 1.4 billion; right? And if you had used the funds'  
3 prospectus, it would have been about 591; correct?

4 A. Around that, yes.

02:06 5 Q. About 800,000?

6 A. Yes.

7 Q. About 25 percent of the total losses on the chart?

8 A. Well, then the benchmark damages would be comparable to  
9 the Lipper damages of about \$2 billion.

02:06 10 Q. And you're saying you intentionally on that one fund,  
11 which is half of your losses, the 1.4 billion on 2.6, more  
12 than half your losses, you just decided to get some variety  
13 you wouldn't use the funds' benchmark.

14 A. No, as I said, for that particular fund because the  
02:07 15 Lipper number was the same as the benchmark, I wanted to see  
16 what the performance was against another benchmark that FMG  
17 had offered. I didn't hide that information from you, it was  
18 clear in my documents what I was doing.

19 Q. Did you mention that yesterday when you said it compared  
02:07 20 the fund versus the prospectus benchmark in your testimony?

21 A. I don't think we spoke about at this at length yesterday.

22 Q. Okay. You didn't tell the Court yesterday that this was  
23 a comparison of the fund's performance versus the prospectus  
24 benchmark that FMG had chosen, you didn't say that yesterday?

02:07 25 A. You know, I don't recall, and I think the testimony was

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1 that I looked at a peer group and I looked at a benchmark, and  
2 those benchmarks are what FMG defines on this report.

3 Q. Mr. Pomerantz, you were here yesterday when I said some  
4 of your prospectus benchmarks were wrong; did you do any  
5 investigation last night to go back and look at the benchmarks  
6 of these numbers?

7 A. No.

8 Q. If you -- if we can hand up what I believe are your work  
9 papers for that chart, which are Defendant's Exhibit 1886 and  
10 1886.1 --

11 MR. MURPHY: If we can hand them out to everyone.

12 Your Honor, it's very small print, I apologize, but  
13 these were the way they were produced. We blew them up the  
14 best we could.

15 BY MR. MURPHY:

16 Q. Mr. Pomerantz, do these appear to be your work papers  
17 that you used to calculate the "losses" on Exhibit P-151-I?

18 A. Yes.

19 MR. MURPHY: And your Honor, I would offer

20 Defendant's Exhibits 1886 and 1886.1 into evidence as the  
21 backup for his chart.

22 THE COURT: Any objection?

23 MR. SWEETSER: No objection.

24 THE COURT: So, Defendant's Exhibits 1886 and

25 1886.1 --

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1 MR. MURPHY: Thank you, your Honor.

2 THE COURT: -- are admitted.

3 (Defendant's Exhibits 1886 and 1886.1 were marked  
4 into evidence.)

02:09 5 BY MR. MURPHY:

6 Q. So, Mr. Pomerantz, looking at 1886 -- do you have that in  
7 front of you?

8 A. Yes.

9 Q. I don't know if Marco can blow it up, but if you can read  
02:09 10 the small print, the first one is the PIMCO Ultra Short Bond  
11 Fund?

12 A. Yes.

13 Q. And to do the analysis of your benchmark returns from  
14 May -- May 2012 backwards, you would get assets from May 2007  
02:10 15 as a starting point?

16 A. What I -- what I was doing was -- was recreating the  
17 analysis that I mentioned yesterday in the annual reports that  
18 talk about the growth of \$10,000, and they produce like a line  
19 graph that shows what the growth of \$10,000 would be at the  
02:10 20 funds returned, and also at the benchmark returns, or the  
21 comparators' returns.

22 And on that graph that's in the annual report it  
23 identifies two terminal values, and the values that I'm trying  
24 to calculate here are the difference between those two  
02:10 25 terminal values --

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1 Q. I don't mean to interrupt you, Mr. Pomerantz; my question  
2 -- and please feel free if you need to keep with your answer,  
3 but I just want to know if you were to do an analysis of how  
4 the funds performed going back five years from May 2012, would  
5 you want the starting assets -- I don't -- I think you were  
6 answering what you're trying to do; I'm just saying if you  
7 were trying to do it right, would you start with the assets  
8 five years back on May 2007 and say that's the beginning  
9 assets?

10 MR. SWEETSER: Objection.

11 THE COURT: Wait, I'm sorry; what's the objection?

12 MR. SWEETSER: Form. I just don't understand what  
13 that question is.

14 THE COURT: You don't understand it? So you have to  
15 rephrase it.

16 BY MR. MURPHY:

17 Q. If you were to calculate the losses going back five years  
18 from May 2007 doing the analysis you did in 151-I, would you  
19 want to get the starting assets going back five years so you  
20 could start with the amount of money in the fund?

21 A. That's one way to do it. I was restricted to doing the  
22 calculations based upon the information that was being  
23 provided to the Board as I knew it. And I can actually walk  
24 you through my analysis.

25 Q. Well, why don't you just tell me, what's the starting

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1 assets that you use for the PIMCO Ultra Short Fund? Can you  
2 tell like for the first -- I guess it would be the period  
3 May -- May 2007 what the starting assets would be?

4 A. Well, it makes an assumption that the starting value is  
5 the 2.5 million that you have in bold.

6 Q. So 2.5 billion, not million.

7 A. Sorry, billion.

8 Q. So you assumed the starting assets were 2.5 billion  
9 around May 2007.

10 A. Implicitly I make that assumption.

11 Q. Okay.

12 MR. MURPHY: And can we hand out Defendant's Exhibit  
13 467.1.

14 Q. So, do you have it, Mr. Pomerantz?

15 A. Yes.

16 Q. And this appear to be a prospectus for the EQAT Trust  
17 date May 2010? There's just some pages of it not the whole  
18 500 pages, but do you recognize it?

19 A. This might be the first time I'm seeing this document,  
20 so --

21 Q. I'm sorry. You could go on -- you could go on the  
22 Internet and download --

23 A. Yeah, I agree, I mean if you represent this is the  
24 prospectus, I mean -- is it from the prospectus or the annual  
25 report?

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1 Q. It says prospectus on the first page. Any reason to  
2 think it's not what it purports to be?

3 A. No.

4 Q. And if you turn to the third page which has the Bates  
5 number 5286, it has the PIMCO Ultra Short Bond Fund.

6 A. Yes.

7 MR. MURPHY: And can we highlight that, Marco, the  
8 2007 number?

9 Q. So this has -- you're looking for the assets for May  
10 2007; correct? To do your analysis, you started with 2.5  
11 billion; is that correct? Mr. Pomerantz?

12 A. Yes.

13 Q. And do you see the assets in that time period were around  
14 700 million, 705.347?

15 A. The 705, yeah, for Class I-A.

16 Q. Okay. So you used as a starting asset value 2.5 billion  
17 for 2007 for this fund, but the prospectus says that the  
18 assets under management were about a quarter of that.

19 MR. SWEETSER: Your Honor, objection. There's  
20 multiple share classes which counsel is limiting his only  
21 answer on to only one share class. There's multiple share  
22 classes with different values in the different share classes.

23 MR. MURPHY: I'll rephrase.

24 THE COURT: Rephrase, please.

25 BY MR. MURPHY:

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1 Q. Mr. Pomerantz, do you see any multiple share classes in  
2 here, or does this just say net assets?

3 A. Well, this prospectus identifies -- this prospectus  
4 identifies net assets for Class I-A and Class-I-B.

02:15 5 Q. Right. So let's just break that down. The 705 is -- you  
6 think it's Class A and you think Class B is what, 564 -- 584?

7 A. I'm sorry; just one moment.

8 So, I'm sorry, this document identifies the assets  
9 at -- for Class I-A and Class-I-B to be 1.2 billion.

02:16 10 Q. Okay, let's accept that as true. The assets around March  
11 31 to December 31, 2007 were around -- call it even 1.3,  
12 right, it's closer to 1.3 than 1.2?

13 A. For these two classes.

14 Q. And you use basically twice that amount for your starting  
02:16 15 assets; correct?

16 A. Well, first of all, I don't know that there aren't other  
17 classes that would have a different prospectus that would have  
18 different asset values, number one.

19 Q. Well, let's assume these are the only two share  
02:16 20 classes --

21 MR. SWEETSER: Your Honor, let's not and say we did.  
22 I mean he should be permitted to answer that question.  
23 There's other share classes; it's pretty significant to this  
24 line of questioning.

02:16 25 MR. MURPHY: If there were other --



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1 THE COURT: Can you rephrase your question?

2 BY MR. MURPHY:

3 Q. If there were other share classes would those be listed  
4 in the prospectus?

02:17 5 A. It's a quite common for there to be multiple prospectuses  
6 for a mutual fund. And some share classes are in some and  
7 some share classes are in another.

8 Q. Do you have any reason to believe that the assets of this  
9 fund were greater than 1.3 billion as you sit here today in  
02:17 10 2007?

11 A. Yeah, I have several reasons. I mean first of all, as I  
12 said, this is a prospectus, I don't know that there aren't  
13 other prospectuses; also, the numbers that are in my  
14 spreadsheet are not coming from this document, they're coming  
02:17 15 from the profitability reports that identify the average  
16 assets per year.

17 Q. And you're aware that the only share classes that are at  
18 issue in this lawsuit are the I-A and I-B shares?

19 A. The analysis that I did is based on the assets -- the  
02:17 20 average assets that are reported on the profitability reports.

21 Q. So in fact those might have other share classes beyond  
22 I-A and I-B that are not at issue in this lawsuit?

23 A. They might.

24 Q. Do you recall testifying about an average for equity and  
02:18 25 bond index funds yesterday, Mr. Pomerantz?

Pomerantz - Cross - Murphy

1 A. Yes.

2 Q. And I think you said that they were 12 and 13 basis

3 points for -- 12 for bond and 13 for equity; is that correct?

4 A. It was either 11 and 12 or 12 and 13, it's the chart

02:18 5 that's in my report.

6 Q. And why don't I just show you the chart that's in your

7 report that you were shown yesterday.

8 MR. MURPHY: It's P-152 at page 48.

9 If you could blow up that chart.

02:18 10 Q. So these are the numbers you're talking about, 12 basis

11 points for equity, and 11 basis points for bond?

12 A. Yes.

13 Q. And you reported it as an average fee; correct?

14 A. Yes.

02:19 15 Q. And I think you said you got that from the ICI Fact Book

16 dated 2013?

17 A. Yes.

18 MR. MURPHY: Can we hand the witness P-117, which is

19 the 2013 ICI Fact Book? Give one to the judge and plaintiff

02:19 20 as well.

21 It's already in evidence, your Honor.

22 BY MR. MURPHY:

23 Q. Do you have it, Mr. Pomerantz?

24 A. Yes.

02:19 25 Q. And if you go to page 79.

Pomerantz - Cross - Murphy

1 A. Yes.

2 Q. Page 79 has the numbers that you're talking about, the 12

3 -- this one's 12 and 13, I think you report them as 11 and 12?

4 A. Is this the chart that's in my report?

02:20

5 Q. No, you pulled the numbers out of this, you cite this

6 report, you cite this in your report, the 2013 Fact Book, and

7 I think you cite page 79; I'm assuming it's the 12 and 13

8 right there.

9 A. Yes.

02:20

10 Q. Index equity funds, and bond funds are right below it.

11 A. Yes.

12 Q. Okay.

13 MR. MURPHY: And if you could blow up that footnote,

14 Marco.

02:20

15 Q. It says: Expense ratios are measured as asset weighted

16 averages, figure excludes mutual funds available as investment

17 choices in variable annuities, and mutual funds that invest

18 primarily in other mutual funds.

19 Do you see that?

02:20

20 A. Yes.

21 Q. So this -- this number excludes mutual funds like the

22 funds at issue here that are used in variable annuities;

23 correct?

24 A. The data behind this, yes, as Morningstar says -- I'm

02:20

25 sorry; Lipper.

Pomerantz - Cross - Murphy

1 Q. And you reported these as just an average, but it  
2 actually says they're asset weighted average?

3 A. I think that's an issue of semantics. If you look at the  
4 text right below the graph, the text says: Similarly the  
5 average expense ratio for index and actively managed bond  
6 funds have fallen --

7 Q. What's ambiguous about the note, expense ratios are  
8 measured at an asset weighted average --

9 A. I agree with that.

10 Q. So it's an asset weighted average. What is an asset  
11 weighted average?

12 A. Well, it would be an average of fees for some set of  
13 mutual funds where funds that are larger would be given a  
14 greater weight than funds that are smaller.

15 MR. MURPHY: Can I get the ELMO, Marco?

16 Q. So let's assume that we have these -- these are seven I  
17 guess we'll call them funds. And let's assume that these are  
18 fees, one basis point, two basis points, so there's seven  
19 funds, 1 charges one basis point, 2 charges two basis points,  
20 3 charges basis points and so on; do you follow me?

21 A. Yes.

22 Q. So how would you calculate the asset weighted average  
23 from these numbers?

24 A. You couldn't.

25 Q. Right. You need to know the assets; correct?

Pomerantz - Cross - Murphy

1 A. Yes.

2 Q. And just explain to the judge, if most of the assets were  
3 in the fund with a 1, and the funds with the 2 and 3 and 4 and  
4 7, 8 and 10 basis points fee, if almost all the funds were in  
5 the 1 what would be the asset weighted average?

6 A. If all the assets -- yeah, if 99 percent of the assets  
7 are in the 1 then you're going to get a one.

8 Q. Even if 80 percent of the assets were in the 1 it might  
9 be like 1.4 or something.

10 A. Sure.

11 Q. So if the fees are disproportionately concentrated in the  
12 lowest cost funds, you'd have an asset weighted number that  
13 wouldn't necessarily be representative of how many funds are  
14 charging that; correct?

15 A. Yeah, an asset weighted average will pay more attention  
16 to big funds and will pay less attention to the mutual funds  
17 that may have 2 or \$3 million in them or a mutual fund with  
18 \$50 million, or a mutual fund with less than a million  
19 dollars. The fee being charged by a mutual fund with a

20 hundred million dollars in it would play virtually no role in  
21 the analysis as opposed to it being treated the same as an FMG  
22 fund.

23 Q. Thank you. And if we can go back to page 79 of P-117.

24 And down below it says: Investor demand for index funds is

25 disproportionately concentrated in the very lowest cost funds.

Pomerantz - Cross - Murphy

1 What do you understand that statement to mean?

2 A. I would really have to ask ICI what that means. To say  
3 investor demand, I think what's -- what's true is that larger  
4 funds have lower fees and smaller funds have higher fees; as  
02:24 5 to whether or not the fees are lower in response to demand or  
6 whether it's a function of the breakpoints, that's -- that's,  
7 you know, that's debate.

8 Q. I think I got you. You're talking about competition  
9 which is not where I'm going; right? We've debated that in  
02:24 10 the past. What I'm asking is just are there some really large  
11 low fee funds in the marketplace is what I was asking.

12 A. There are many many funds which fees below 10 basis  
13 points, not just Vanguard and Fidelity, there are dozens of  
14 funds that have less than 10 basis points fees.

02:24 15 Q. But Vanguard -- you've testified Vanguard has about a  
16 trillion dollars in assets and index funds that have very very  
17 low fees; do you recall that?

18 A. Fiduciary has more and they're cheaper.

19 Q. Right. So there's some really low cost big assets;  
02:25 20 right?

21 A. Yeah, as I said there are probably a dozen large funds  
22 that have less than a 10 basis point charge.

23 Q. Can you turn to the next page of this chart that you  
24 relied on, page 80 in P-117. Can we blow up that chart?

02:25 25 So this is the expense ratios, not just of index funds,

Pomerantz - Cross - Murphy

1 but it includes index funds and all other funds; is that  
2 correct?

3 A. Yeah, this is the whole universe they have.

4 Q. Right. So let's take equity funds; a bunch of the funds  
5 here are equity funds; correct?

6 MR. SWEETSER: Your Honor, I object. Dr. Pomerantz  
7 didn't give any opinion on expense ratios. He spoke about the  
8 investment management fee; expense ratios includes other fees  
9 as well which he didn't opine on. This is outside the scope  
10 of his opinion in this case.

11 THE COURT: All right. Overruled. I think it goes  
12 to credibility.

13 MR. MURPHY: And your Honor, just for clarity, the  
14 11 and 12 basis points in the previous page are expense ratios  
15 as well.

16 BY MR. MURPHY:

17 Q. So, Mr. Pomerantz, a bunch of funds here are equity  
18 funds; correct?

19 A. On the chart?

20 Q. No, I'm sorry; at issue in the case.

21 A. At issue in the case? I think three -- two of the funds  
22 are actively managed equity funds, yes.

23 Q. Sorry. My question was, are a bunch of the funds here  
24 equity funds.

25 A. Yes.

Pomerantz - Cross - Murphy

1 Q. Okay. And so let's just take this first one. What is  
2 the 10th percentile mean, the 77, what would that reflect?

3 A. That would mean that 10 percent of the mutual funds in  
4 that category have a fee below 77 basis points.

02:26 5 Q. So the lowest -- the lowest 10 percent of -- the cheapest  
6 10 percent of funds in the industry equity funds, they have a  
7 fee of 77 basis points or less.

8 A. Yeah, if you look -- if you're looking at their total  
9 expense ratio.

02:26 10 Q. Right. And that would be .77 percent.

11 A. Again those numbers include -- it's a total expense ratio  
12 and it also includes 12(b)(1) fees, it includes every fee that  
13 is going to be disclosed.

02:27 14 Q. Correct. Just as -- just as FMG's total expense ratio  
15 includes all those fees as well; correct?

16 A. Yes.

17 Q. And what's the median, the 133?

18 A. That means that half of the funds in that category exceed  
19 that number, and half are below that number.

02:27 20 Q. So if there was 5,000 funds, the 2,500th fund, whatever  
21 that fee is that would be what the median would be; correct?

22 A. Technically no, but yes.

02:27 23 Q. You're the Ph.D., tell me where I go wrong. I'm just  
24 trying to figure out what the numbers are. Is it right or  
25 wrong?



Pomerantz - Cross - Murphy

1 A. For an even number it's not right, but in essence you're  
2 right.

3 Q. Okay. So fair enough. If it was 5,001, it would be the  
4 2,500 or 2,501 --

02:27 5 A. I don't know. But yes.

6 Q. And then what's -- what's the 90th percentile?

7 A. That similarly means -- let's say 10 percent of the funds  
8 in that category have a total expense ratio that exceeds that  
9 value.

02:28 10 Q. Okay. And then what about -- there's your asset weighted  
11 average, we know what that is; correct?

12 A. Yes.

13 Q. And what's the simple average?

02:28 14 A. If there are 5,000 funds in that category, then we're  
15 going just add up 5,000 numbers and divide by 5,000, and weigh  
16 each fund equally.

17 Q. And that number is 141 basis points or 1.41 percent;  
18 correct?

19 A. Yes.

02:28 20 Q. So using a simple average, the total expense ratio -- I  
21 mean none of the funds here have an expense ratio over 100; is  
22 that correct?

02:28 23 A. I don't know, but that's not a relevant comparison,  
24 that's -- that's looking at the total fee. My understanding  
25 is that that's not what this case is about, it's not what my

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1 analysis is about, my analysis is about the management fee.

2 That number is -- is altered by what the 12(b)(1) fee is, it's

3 altered by what the actual administrative fees are, what the

4 sub-advisory fees are; there's lots of components that go into

02:29 5 that number.

6 Q. So you don't think it's appropriate to do an expense

7 ratio comparison.

8 A. Well, that's another question; no, I don't think -- I

9 don't think fee comparisons are relevant at all.

02:29 10 Q. Well, that's a different question. Why don't we go back

11 to P-152 at page 48.

12 So you understand that this is a total expense ratio;

13 right? That's where these numbers come from?

14 A. Yes.

02:29 15 Q. And these are a total expense ratio; correct?

16 A. No, those are not the total expense ratios. All right,

17 let's be clear. I mean the middle column are index funds,

18 that's a total; the column on the right, the fee of the

19 subject fund -- the subject funds, have administrative fees,

02:29 20 12(b)(1)s, all of that. So it's not the total right, that's

21 -- that's just the management fee is what I believe James was

22 referring to.

23 MR. MURPHY: Can we go back to P-117, page 79?

24 Q. And these are -- these are total expense ratios, too;

02:30 25 right? They're not management fee or admin fee, you were

Pomerantz - Cross - Murphy

1 comparing the total expense ratio; correct?

2 A. I'm sorry; what is your question?

3 Q. These reflect the total expense ratios that you just said

4 you don't think the comparisons are appropriate to look at

02:30 5 total expense ratios, these are total expense ratios; correct?

6 It's not just management fee.

7 A. The numbers on that chart are total expense ratios.

8 Q. Okay. And you're aware the Board was given information

9 from Lipper on management fees?

02:30 10 A. Yes.

11 Q. And on comparative fees; correct?

12 A. I don't recall the detail, but yes, probably.

13 Q. Is Lipper widely used by mutual fund boards for

14 comparative fee analysis?

02:30 15 A. Yes.

16 Q. And you would consider Lipper authoritative; correct?

17 A. I mean I guess it depends like what -- what aspect of

18 Lipper you're asking about.

19 Q. Well, did you testify in the Hartford case that you said,

02:31 20 I consider Lipper to be authoritative?

21 A. Well, they are an authoritative source of data.

22 Q. Okay. Is Lipper considered to be independent?

23 MR. SWEETSER: Objection, your Honor.

24 A. I don't know that --

02:31 25 THE COURT: Overruled.

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1 A. I don't know that I have an opinion on that.

2 Q. Did you testify in the American Century case that

3 Lipper's considered to be independent?

4 A. They're considered to be.

02:31

5 MR. MURPHY: Can we hand out 151-A? I think they  
6 were shown probably today -- maybe I should ask; does anyone  
7 need another copy, your Honor, of 151-A?

8 THE COURT: I think I have it. I don't know about  
9 Mr. Pomerantz.

02:31

10 Do you have 151?

11 THE WITNESS: I can read the screen, your Honor.

12 THE COURT: Okay.

13 THE WITNESS: So far.

14 BY MR. MURPHY:

02:32

15 Q. And I believe you testified, Mr. Pomerantz, that these  
16 numbers come from P-52-B; is that correct? The landscape  
17 chart?

18 A. Yes.

02:32

19 Q. And what you did -- again, I don't want to belabor this  
20 because you talked about it, but you basically just took for  
21 Common Stock, the total management fee and subtracted out the  
22 sub-advisory fee to get the amount paid to FMG; correct?

23 A. Yes.

02:32

24 Q. So that's just the total management fee less the  
25 sub-advisory fee.

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1 A. Yes.

2 Q. And you did the same thing for the administrative fee,  
3 you took the total administrative fee and deducted the  
4 sub-administration fee, and the column to left would be the  
5 retained fee.

6 A. Yes.

7 Q. If we can look at P-52-B -- do you need a copy of that,  
8 Mr. Pomerantz?

9 A. I can read the screen.

10 Q. If you can read that that's even easier because that's  
11 what I'm using. So Common Stock, the management fees were 16  
12 million, and the sub-advisory fees were 2390?

13 A. Yes.

14 Q. And you deducted 16.6 minus 23 to get 14.261; correct?

15 A. Yes.

16 Q. And that's the amount paid to FMG.

17 A. Yes.

18 Q. And then what did you do with the \$6 million of product  
19 cap reimbursements?

20 A. For this chart I ignored everything but the sub-advisory  
21 fee.

22 Q. And what are product cap reimbursements?

23 A. They might be reimbursements, I don't know.

24 Q. Well, let's assume AXA had to return \$6 million under a  
25 product cap reimbursement, return the fee paid, you'd want to

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1 reflect that in the amount paid to FMG; right?

2 A. You know, I just was being consistent across all of the  
3 funds, and I just take the management fee and I subtract the  
4 sub-advisory fee.

02:34 5 Q. Right. You don't have much accounting experience;  
6 correct?

7 A. I -- as far as understanding these reports I do.

8 Q. So, what's offset to revenue?

9 A. It's what it says.

02:34 10 Q. It's a deduction from revenue.

11 A. That -- that's what it says, I don't know necessarily  
12 where that money's going.

13 Q. Well, how do you know from your experience reading these  
14 charts if that's not some money that actually FMG isn't  
02:34 15 keeping, if it's an offset to revenue?

16 A. I think that you could -- if you wanted you could make  
17 adjustments to this report based on -- I think the product cap  
18 reimbursement that you're pointing to, I don't know that there  
19 were any or many other funds that had a line item like that,  
02:35 20 and you can certainly make adjustments based on that, but in  
21 almost all of the funds that value is zero. And I'm just as I  
22 said taking the management fee and subtracting the  
23 sub-advisory fee.

02:35 24 MR. MURPHY: If you could -- can you move those  
25 boxes out of the way, Marco?

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1 Q. The next one is the Core Bond, like what is it, like a  
2 million 7 in that one, too? Do you have it? Sorry; 728,000?  
3 Do you see that? Another offset -- sorry; reimbursement.

4 A. I don't know what those are reimbursements to. I don't  
5 know that those are coming out of -- it's not clear to me  
6 where that money's coming from or where it's going or that it  
7 has anything to do with the spread between the management fee  
8 and the sub-advisory fee.

9 And in fact, the numbers that I have here are  
10 reasonably close to what you would expect just coming off of  
11 the fee schedules. So -- if there's a permanent reimbursement  
12 or adjustment then it should be reflected in the fee schedules  
13 which are the items that are actually being negotiated.

14 Q. If you could go to 203 of 52-B.

15 MR. MURPHY: Do we have that, Marco?

16 Q. So this is -- this is the T.Rowe Growth Fund, if you look  
17 at page 203 of 52 -- P-52-B, here there's a column for fee  
18 waivers, 116,000. You didn't the account of the fee waivers  
19 either when you did the math; correct?

20 A. No, my analysis is looking at the management fee minus  
21 the sub-advisory fee.

22 Q. Well, if let's say -- let's say FMG's paid \$3 million,  
23 \$3.1 million, and it gave a hundred -- never really collected  
24 a hundred thousand of that because it waived its fee, don't  
25 you think that would be a fair thing to reflect in the chart

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1 in terms of the fee retained by FMG?

2 A. I don't know the history of that 116,000, for all I know  
3 it's a reimbursement back to the fund for an overcharge that  
4 was deemed -- being done in a prior year. So, I don't -- I  
5 don't know the source of -- or the reasons behind that number.  
6 And so I just look at the difference.

7 Q. Okay. P-151-J. Do you recall this is the damage chart  
8 you talked about earlier today?

9 A. Yes.

10 Q. And just to be clear, the 39 percent profit margin, that  
11 excludes sub-advisory fees as an expense; correct?

12 A. Yes.

13 Q. And it excludes what we would call the AXA \$49 million of  
14 allocated costs; correct?

15 A. Yes.

16 Q. If you look at the bottom chart that's the damage  
17 calculation for administrative fees. So, this one, Mr.  
18 Pomerantz, you calculated for the admin fees in 2012 that if  
19 you allow FMG to calculate -- to capture some profit, 39  
20 percent of profit after they pay all their costs, they get a  
21 39 percent profit, if the funds -- if they return to the fund  
22 \$4.8 million; is that correct?

23 A. Yes.

24 Q. That would still allow them to cover their costs and earn  
25 a little bit of extra money; correct?



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1 A. Yes.

2 Q. Okay. And if you go to 152-E, which we can put up on the  
3 screen for ease, these are the charts we just looked at for  
4 the amount of the admin fee retained -- I believe it's 152-E.

02:39 5 MR. MURPHY: Yeah, 152-E -- P-151-E. Can we  
6 highlight the first one, Common Stock?

7 BY MR. MURPHY:

8 Q. 4.478; is that correct?

9 A. Yes.

02:39 10 Q. So that's -- that's the total fee that FMG got, 4.478;  
11 right? After they paid the sub-administrator fee, they --  
12 they kept 4.478; right?

13 A. Yes.

02:40 14 Q. So -- let's write that down; 4.478. And go back to the  
15 damage chart to see how much are the damages. So, the  
16 damages, you think they should return 4.85 million of the fee,  
17 and they'll still have a little bit of profit, but they only  
18 received 4.478. How can they return more than they kept by  
19 400,000 and still earn a profit?

02:40 20 A. I would have to check the calculations that I did, it  
21 would appear that there's something wrong.

22 Q. There would be an error in there somewhere; correct?

23 A. Yes.

02:40 24 Q. In fact, didn't we point out an error very similar to  
25 this, a 12 percent margin in your expert report, and you

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1 corrected it in your rebuttal report; correct?

2 A. Yes.

3 Q. And then you showed up with the incorrect chart again at  
4 trial; correct?

02:40 5 A. I mean I may have accidentally pulled the original chart  
6 rather than the corrected one.

7 MR. MURPHY: If we can go to 151-K.

8 Q. This was shown to you today. So, on this one, this is  
9 the same flavor of analysis; right? This purports to be some  
10 damages that would allow FMG to capture some margins?

02:41 11 A. Yes.

12 Q. And these are the same thing, you excluded FMG's -- or  
13 sorry; AXA's allocated costs and sub-advisory fees?

14 A. Yes.

02:41 15 Q. And on these, so just help me read the chart; the 50  
16 percent, they would get 18 -- they would return \$18 million to  
17 the funds on a 50 percent margin?

18 A. Yes.

02:41 19 Q. And then 60 it goes down a little bit, 70 it goes down a  
20 little bit, 80 goes down a little bit; and then how does it  
21 get to 90, how does it go in half when you just move the  
22 margin 10 percent?

02:42 23 A. Yeah, actually that's interesting, I asked myself the  
24 same question when I did this and it's -- it's just in the  
25 math basically. It just the -- there's a big dollar movement

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1 as margins move from the break-even, down to the 90, 80, 70  
2 range and then it levels out very quickly.

3 Q. And then how do you get to a negative number in Common  
4 Stock of negative 53, that they earn -- they earned a 90  
5 percent margin but it's a negative number?

6 A. Well, in this case what that would mean is -- and if you  
7 look at that you'll see that on that row, the zero would be  
8 somewhere around 55 percent. Right? Because 50 percent is  
9 1.3 million, 60 percent is minus 1.9 million, so zero is

10 somewhere around 55; so that particular fund actually has a 55  
11 percent margin.

12 Q. So your damages would be FMG is owed some money.

13 A. Well --

14 Q. Is that correct?

15 A. Well, we would owe you money.

16 Q. Correct. Well, you're not the plaintiff, but someone  
17 would owe FMG some money for the Common Stock Index Portfolio.

18 A. Well, because this chart is calculating what the damages  
19 would be at all of these different margin levels, and what  
20 that row represents is that that particular fund is not  
21 operating at a 90 or a 95 percent margin.

22 Q. Are you the director of risk management at Gordon Asset  
23 Management?

24 A. Not anymore.

25 Q. When were you -- when did you lose your -- well, how did

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1 you -- when did you stop being the director of risk management  
2 at Gordon Asset Management?

3 A. Around 2007.

4 Q. Okay. Gordon Asset Management, they managed funds of  
5 funds; is that correct?

6 A. Funds of hedge funds.

7 Q. And they manage a fund called Ageis; is that correct?

8 A. It's Aijed with a D.

9 Q. And can you spell that for Mr. Gable?

10 A. A-i-j-e-d.

11 Q. And they have two or three other funds; is that correct?

12 A. Well, we're talking about 2007? I don't know anything  
13 about the current, but 2007 I -- I believe there were two, I  
14 believe there were two other funds.

15 Q. And what were the names of those funds?

16 A. There was a Gordon Associates and a Gordon Strategic.

17 Q. And Gordon oversaw and monitored the underlying advisors  
18 for that funds; is that fair?

19 A. Gordon's responsibility is -- yes, that's one of -- one  
20 of the things that Gordon has to do, right.

21 Q. And all of the funds are managed by sub-advisors;  
22 correct? All of the assets I mean?

23 A. Yes.

24 Q. And Gordon does due diligence on those sub-advisors?

25 A. Yes.

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1 Q. And the underlying sub-advisors for Gordon, they have  
2 day-to-day investment management responsibility; correct?

3 A. Yes.

4 Q. And Gordon didn't retain any other day-to-day investment  
5 management responsibilities; correct?

6 A. Other than re-allocation and cash flow, I mean that's a  
7 responsibility of Gordon's.

8 Q. And they did due diligence on sub-advisors?

9 A. Yes.

10 Q. And what does Gordon charge for overseeing and monitoring  
11 this collection of sub-advisors?

12 A. The fee structure was different for the fund, but there  
13 was a base fee of maybe a half to one percent depending on the  
14 fund, and then there's a performance -- a performance fee as  
15 well.

16 Q. And one of the funds was a one percent; is that correct?

17 A. There were three funds, I couldn't tell you the fee of  
18 each one, but that's sounds about right.

19 MR. MURPHY: Why don't we play clip 33, AXA  
20 transcript 107.

21 MR. SWEETSER: Your Honor, before we play any clips,  
22 it's my understanding, and I may be wrong, but it's my  
23 recollection in this case that the funds we're referring to  
24 are hedge funds, which are not controlled by law which do not  
25 have this fiduciary doesn't exist. I would just like counsel

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1 to clarify that, because if we're talking about apples and  
2 oranges it may be misleading. I may be go mistaken but I'd  
3 like some clarification on this.

02:46

4 MR. MURPHY: I think he testified it was exactly  
5 what the responsibilities were. He's overseeing sub-advisors  
6 and he's charging a fee, that's exactly at issue in this case.

7 MR. SWEETSER: Again, your Honor --

8 THE COURT: You'll have to a chance to redirect, Mr.  
9 Sweetser, so you may play the clip.

02:46

10 THE WITNESS: Technically they're not called  
11 sub-advisors, they're partnerships.

12 BY MR. MURPHY:

13 Q. Well, you say that, Mr. Pomerantz, but you used the term  
14 sub-advisor in your deposition; correct?

02:46

15 A. That's because I'm using the language of the mutual fund  
16 industry.

17 Q. Okay. So you called them sub-advisors, not me.

18 A. I'm calling them that because that's the language that's  
19 being used in this case; legally they are not sub-advisors,

02:47

20 they are partnerships.

21 Q. And then just so I'm clear, is the fee on some of these  
22 funds that you're overseeing sub-advisors for, where Gordon is  
23 overseeing them, you charge one percent for some of them;  
24 correct?

02:47

25 A. Yes.

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1 Q. And then on top of that you charge 20 percent of the  
2 returns if they're above some threshold?

3 A. That sounds about right. I don't know the exact numbers,  
4 but that sounds about right.

02:47 5 Q. So one percent is a hundred basis points; correct?

6 A. Yes.

7 Q. And that's higher than any of the funds that FMG charges  
8 here for both FMG's fees and the sub-advisors; correct?

9 A. It's a completely different business.

02:47 10 Q. Is it correct?

11 A. It's apples and oranges, but I mean yeah, I don't  
12 disagree that the fee is one percent.

13 Q. Do you recall talking about yesterday that you saw a  
14 document that said FMG had delegated day-to-day investment  
02:48 15 management functions; do you recall that?

16 A. I'm sorry; this was a document in evidence, or that you  
17 indicated?

18 Q. I think -- you tell me, Mr. Pomerantz. So you said  
19 yesterday that you saw some documents that you helped inform  
02:48 20 for your opinion that FMG had delegated day-to-day investment  
21 management responsibility; do you recall that?

22 A. Yes, I said that I had seen documents and I was referring  
23 to the SAI.

24 Q. And could investment management mean just the decisions  
02:48 25 of what to buy and sell within the objectives of the fund? Is

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1 that a reasonable definition?

2 A. I'm sorry; what is the question?

3 Q. Investment management, you saw those words in the  
4 document you relied on; correct?

02:48 5 A. Yes.

6 Q. And I want to know is a reasonable definition of  
7 investment management there just the decisions of what to buy  
8 and sell within the objectives of the fund.

9 MR. SWEETSER: Your Honor, I object to what's in the  
02:49 10 mind of the drafter that wrote it, I mean it says what it  
11 says. And as I understand counsel's question it has to do  
12 with can he interpret what was in the mind of the person that  
13 wrote it.

14 THE COURT: Frank, can you just repeat the question,  
02:49 15 please?

16 (Question read back by the reporter.)

17 THE COURT: Overruled. You may answer that  
18 question.

19 THE WITNESS: Are you asking me what the phrase --

02:49 20 THE COURT: You don't understand it?

21 THE WITNESS: I don't. That's why I'm seeking  
22 clarification.

23 THE COURT: Can you rephrase, please? What happened  
24 to Mr. Murphy.

02:49 25 MR. MURPHY: I'm just kneeling down.



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1 THE COURT: I thought I lost you.

2 MR. MURPHY: I fainted.

3 THE COURT: Exactly. Could you rephrase your  
4 question? Dr. Pomerantz doesn't seem to understand it.

02:49 5 BY MR. MURPHY:

6 Q. So, my question was, could investment management as that  
7 term is used, could that refer to the decisions of what to buy  
8 and sell within the objectives of the fund?

02:50 9 A. When you say as that term is used, I'm just seeking  
10 clarification of in what context; in the context of the  
11 sentence in that document or in a conversation, or in using  
12 that phrase somewhere else? I just want clarification or do  
13 you want to ask me the intent of the author of the SAI?

02:50 14 Q. Why don't I show you -- if we can hand out a deposition  
15 from -- a page from a deposition in the Bennett case; you  
16 testified in that case under oath?

17 A. Is that Fidelity?

18 Q. Yes.

19 A. Yes.

02:50 20 MR. MURPHY: Defendant's Exhibit 1894.1, if we can  
21 get Mr. Sweetser one as well.

22 THE COURT: What was the exhibit?

23 MR. MURPHY: Sorry; 1894.1.

24 BY MR. MURPHY:

02:51 25 Q. Do you recall testifying in this case, Mr. Pomerantz?

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1 A. Yes.

2 Q. And if you look at page 97, in your expert report you use

3 the term "investment management services"; do you recall that?

4 So, in your expert report you use those terms in that case;

02:51 5 correct?

6 MR. SWEETSER: Your Honor, I object. Counsel is

7 asking about a document that I understand his client prepared,

8 now he's asking about another case and a phrase that was used

9 in an expert report by Mr. Pomerantz has nothing to do with

02:51 10 FMG's meaning when it included that in the document that

11 counsel was asking about at the start of this line of

12 questioning. It's completely inappropriate question and this

13 deposition has nothing to do with his answer with regard to

14 the content of what was in the document that counsel is asking

02:51 15 about.

16 MR. MURPHY: Your Honor, may be heard on that?

17 THE COURT: You may.

18 MR. MURPHY: So, we drafted the document; Mr.

19 Sweetser doesn't want to hear about what my witnesses think

02:52 20 that mean. He offers Mr. Pomerantz to interpret what he means

21 -- he thinks it means and he offered an opinion on it

22 yesterday. Now, in another case he used these exact same

23 words in his report to mean something that -- we agree with

24 his definition, it means stock selection; I should be entitled

02:52 25 to impeach him on that. This is exactly the statement he

Pomerantz - Cross - Murphy

1 testified about yesterday.

2 THE COURT: All right. Overruled.

3 BY MR. MURPHY:

02:52 4 Q. So, can you define that phrase for me, meaning investment  
5 management services; correct?

6 A. I stick by that definition; right? If I say ultimately  
7 the decisions of what to buy and what to sell subject to  
8 constraints and objectives, that is investment management.

02:52 9 Q. Okay, thank you. And then you also talked about  
10 proprietary funds; do you recall that?

11 A. Yes.

12 Q. And you said some of the sub-advisors have proprietary  
13 funds?

14 A. All but one.

02:52 15 Q. And you actually pointed to some of those in your expert  
16 report; correct?

17 A. Yes.

18 Q. Do you have P-151 there? Your expert report?

19 A. Yes.

02:53 20 Q. It's page 66.

21 You'll be glad to know, Mr. Pomerantz, I don't have an  
22 outline at this point so I must be almost done; if you can  
23 just bear with me for five minutes. Do you need it? I can  
24 hand it up.

02:53 25 A. I'm successfully able to read up here.

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1 Q. Okay, fair enough. The one problem is it goes over two  
2 pages, I want to do the Large Cap Value PLUS, then you have to  
3 go to the next page to see the comparable fund, I think they  
4 are kind of listed down below; right?

02:53 5 A. Yes.

6 MR. MURPHY: Do you have the next page, Marco?

7 Q. So the next page would be -- so Large Cap Value PLUS, you  
8 have the proprietary fund of Alliance Bernstein APGAX;  
9 correct?

02:53 10 A. Yes.

11 Q. Which would make sense because Alliance Bernstein's a  
12 sub-advisor to the Large Cap Value PLUS Fund?

13 A. An affiliated sub-advisor.

14 MR. MURPHY: And so can we hand Mr. Pomerantz  
02:54 15 DX-1918, and hand that up to the Court and Mr. Sweetser  
16 please?

17 Q. So this is the prospectus for that fund; right? You see  
18 the ticker up in the left, APGAX, the same one that appeared  
19 in your report?

02:54 20 A. Yes.

21 MR. MURPHY: And if you can go down, Marco, to the  
22 fees and expenses part.

23 Q. What's the management fee for the fund there?

24 THE COURT: What page are you on?

02:54 25 MR. MURPHY: Sorry; in the document it should be the

Pomerantz - Cross - Murphy

1 very first page, the kind of boxes down at the bottom.

2 Q. What's the management fee on that proprietary fund?

3 A. 75.

4 Q. And that -- that exceeds what the -- what FMG charges on  
5 the fund that it oversees; correct?

6 A. I mean I don't -- I don't know if we're comparing apples  
7 to apples here, I mean I'm not sure --

8 Q. You tell me, Mr. Pomerantz. You said this is a  
9 proprietary fund --

10 MR. SWEETSER: Your Honor, may the witness tell him  
11 before he interrupts him and asks him to tell him? He was  
12 answering the question and he interrupted and said you tell  
13 me. I'd appreciate if he can answer the question.

14 MR. MURPHY: I apologize. Go ahead, Mr. Pomerantz.

15 THE COURT: You may answer. I said he can answer.

16 MR. SWEETSER: I appreciate that, your Honor. With  
17 respect to this document. I see that it's dated October --

18 THE COURT: Do you have another objection?

19 MR. SWEETSER: I do, your Honor. With respect to

20 the document I see that it's dated October 30, 2015; Dr.

21 Pomerantz wrote his report two years ago. I don't know how  
22 this document and what's going on a couple of months ago have  
23 anything to do with an opinion that he rendered that was based  
24 upon a report that he prepared two years ago.

25 THE COURT: Well, we'll listen to the questions and

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1 then you can object.

2 BY MR. MURPHY:

3 Q. Why don't I rephrase the question, Mr. Pomerantz. You  
4 testified that each of the sub-advisors, save one, has  
5 proprietary funds; correct?

6 A. Yes.

7 Q. And you said the Board could just go out and hire the  
8 sub-advisor directly and get the proprietary product; correct?

9 A. They could.

10 Q. That was your point, wasn't it?

11 A. Yes.

12 Q. And in fact, here's one of the funds, and it charges 75  
13 basis points for a management fee; correct?

14 A. Yeah, but this -- this is completely different.

15 Q. Is that correct; Mr. Pomerantz?

16 A. They charge 75 basis points, but I don't know what that  
17 management fee is, I don't know what's being provided for  
18 that, I don't know what were the result -- what were the  
19 negotiations between the -- is this an Alliance Bernstein  
20 fund? If I could see -- yeah. So I don't know what happened  
21 between Alliance Bernstein the advisor and Alliance  
22 Bernstein's board; I don't know what this fund is doing; I  
23 don't know what the management fee is paying for; it's a  
24 completely kind of business structure. Alliance Bernstein --  
25 the board of Alliance Bernstein has not gone out and hired a

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1 sub-advisor, whereas FMG's Board has gone out and hired a  
2 sub-advisor; these are two different business models.

3 Q. Right, but I thought you said --

4 A. So why would I compare the fee of two businesses that  
5 have very different structures.

6 Q. I thought your point was that this Board, the EQAT Board,  
7 why should they hire FMG and then a sub-advisor when they  
8 could go get the product directly from the proprietary  
9 manager.

10 A. But this is not the same product that -- that FMG offers  
11 under this name. I mean the Board of FMG could go to Alliance  
12 Bernstein and omit FMG, they could go to Alliance Bernstein  
13 and they could have an negotiation with them and they can buy  
14 some product from them; I don't know if -- if this is the  
15 product and if this is the product that they want to buy, that  
16 conversation never happened. So I don't know what fee would  
17 be negotiated between the Board of FMG and Alliance Bernstein.  
18 That number is a result of a negotiation between Alliance  
19 Bernstein the advisor, and Alliance Bernstein the board.

20 Q. But this is the fund you selected as a proprietary fund;  
21 correct?

22 A. I actually -- well, the purpose in my report was to  
23 illustrate that the sub-advisors in question, actually have  
24 funds that have delivered better returns than a corresponding  
25 FMG fund.

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1 Q. If you could go to P-509, it might be easier, Mr.

2 Pomerantz -- probably last question; just to call it up.

3 P-509 and it's page 5.

4 MR. MURPHY: Just highlight that box Large Cap Value

5 PLUS on the right. On the right; sorry.

6 Q. So we just saw that the proprietary fund that you thought

7 was similar to this charges 75 basis points; FMG to oversee

8 Alliance Bernstein in its product, charges 50 basis points,

9 break points down to 35, about half of what -- 37 is the final

10 breakpoint is half of what Alliance Bernstein charges in their

11 proprietary product?

12 A. I'm sorry, Sean -- Mr. Murphy, what is this that I'm

13 looking at?

14 Q. It's a joint stipulated exhibit that both sides says

15 reflects the fee schedules of the funds at issue.

16 A. And which fee schedule is this?

17 Q. This is the Large Cap Value PLUS Fund; right?

18 A. So that's the management fee.

19 Q. Correct. Which we just looked at was 75 for the

20 proprietary product.

21 A. So it's a completely different product.

22 Q. You said it was the proprietary fund and compared it to

23 this fund though.

24 A. The point I made in my report was that there are other

25 products out there that are offering better performance.



Redirect - Pomerantz - Sweetser

1 If -- if you want to go down your road and argue that the  
2 Alliance Bernstein fund is more expensive, then I would  
3 question why is the Board at FMG satisfied with a worse return  
4 than what Alliance Bernstein is generating for their own  
5 proprietary funds.

6 MR. MURPHY: No more questions, your Honor.

7 THE COURT: All right, thank you.

8 Redirect.

9 (REDIRECT EXAMINATION OF STEVE POMERANTZ, PH.D., BY MR.

10 SWEETSER:)

11 Q. Mr. Pomerantz, counsel pointed out that you made an error  
12 in 151-J; you acknowledge you made an error when you were  
13 calculating the 39 percent profit margin?

14 A. On the administrative section, yes.

15 Q. Just in the administrative section, that's the only  
16 section he was asking you about; right?

17 A. Yes.

18 Q. Now, the source for that was 151-E; right? Can you get  
19 that document please?

20 THE COURT: What exhibit are you looking at?

21 MR. SWEETSER: 151-E, your Honor.

22 THE COURT: Thank you.

23 A. I'm sorry, Counselor, I have a stack of papers; can you  
24 just tell me what that document is?

25 Q. 151-E, it's the comparison of FMG's administration fees

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1 to sub-administration fees.

2 THE COURT: Here you go.

3 THE WITNESS: Thank you, your Honor. Sorry.

4 THE COURT: I didn't write on that, did I?

03:01 5 THE WITNESS: Oh, no, there's a circle.

6 THE COURT: Okay.

7 BY MR. SWEETSER:

8 Q. Do you have that?

9 A. Yes.

03:01 10 Q. Just to confirm, there is no error in this document that  
11 was pointed on; correct?

12 A. Correct.

13 Q. And at the end of the day in 2012, FMG was paid \$39.3  
14 million in administration fees; correct?

03:01 15 A. Yes.

16 Q. And at the same time JP Morgan, the sub-administration --  
17 the sub-administrator was paid \$3.4 million; right?

18 A. Yes.

19 Q. And that difference, those numbers are accurate; correct?

03:01 20 A. Yes.

21 Q. Counsel was asking you about the Lipper average index  
22 fee, do you remember it was in the 12 or 13 percent range?

23 MR. MURPHY: Objection, your Honor; there wasn't a  
24 Lipper average, it was an ICI reported number.

03:02 25 MR. SWEETSER: I'm sorry.

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1 THE WITNESS: The ICI report but they cite Lipper as  
2 the source.

3 BY MR. SWEETSER:

4 Q. Regardless, with respect to counsel's questioning, I  
5 understand that it's an asset weighted calculation; correct?

6 A. Yes.

7 Q. So, the smaller funds might be more, they may not be more  
8 than what was reflected in that average; correct?

9 A. Well, I mean we know that smaller funds have higher fees  
10 then the average, and larger funds are smaller than the  
11 average.

12 Q. Well, your Honor may not know and I certainly don't  
13 necessarily know, but it could be that -- I think counsel's  
14 point was, for funds with lower -- with funds with lower  
15 assets under management it could be a higher fee because it's  
16 an asset weighted average; correct?

17 A. Yes.

18 Q. Let's tell the Court about what -- in the four index  
19 funds in this case what the average assets under management  
20 are. So if you can go to 52-B, which you referred to  
21 throughout the case. For each of the four index funds, will  
22 you tell the Court what the average assets under management  
23 are in each of those four funds.

24 A. This is as of 2012 --

25 Q. So this is a few years -- a few years ago.

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1 A. Yes.

2 Q. So for 2012 just if you would just tell the Court the  
3 funds and the assets under management in each of those four  
4 funds.

03:03

5 A. Common Stock is 4.8 billion.

6 Q. And again, that's the Common Stock Index Fund?

7 A. Yes.

8 Q. And that's 4.8 billion?

9 A. Yes.

03:03

10 Q. Okay.

11 A. The Core Bond Index Fund is 6.4 billion.

12 Q. Core Bond Index Fund 6.4; is that correct?

13 A. Yes.

14 Q. Okay.

03:04

15 A. The Equity 500 Index Fund is 3.0 billion.

16 Q. Three billion. And the Intermediate Government Bond  
17 Index Fund?

18 A. Is 7.4 billion.

19 Q. And that was back in 2012.

03:04

20 A. Yes.

21 Q. So the plaintiffs' four index funds are all multi-billion  
22 dollar index funds; correct?

23 A. Yes.

24 Q. Counsel also pointed out to you that the ICI average did  
25 not include variable annuities like variable annuities

03:04

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1 involved in this case; right?

2 A. Yes.

3 Q. And you acknowledged that fact.

4 A. Yes.

03:04

5 Q. Is there any difference in the investment management

6 services required to manage a variable annuity mutual fund as

7 opposed to a non-variable annuity mutual fund?

8 A. No.

9 Q. It's the exact same thing; right?

03:05

10 A. Yes.

11 Q. When counsel was asking about the fees involved in a

12 variable annuity mutual fund, I think at one point he started

13 asking about expense ratios and whether that included all the

14 fees and I think you said it includes all the fees; do you

03:05

15 remember that testimony?

16 A. Vaguely.

17 Q. Expense ratios generally include all of the fees that go

18 into what's charged to a mutual fund; is that correct?

19 A. A total expense ratio includes everything, is three

03:05

20 components, there's investment, administration and

21 distribution.

22 Q. Okay. Now, that's not everything with a variable

23 annuity, is it.

24 A. No.

03:05

25 Q. Because with variable annuities you're aware there are

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1 contract level fees, insurance fees, what's been called as the  
2 product wrapper; right?

3 A. M & E?

4 Q. I'm sorry?

03:05 5 A. Typically called M & E.

6 Q. Well, M & E but there's other ones that have been

7 discussed in the case which I don't want to get into, but I

8 just want to be clear and I want you to be clear with the

9 Court; when we talk about a expense ratio, it's those three

03:05 10 fees that are being referred to, it's not the -- you know, as

11 Mr. Mr. Barrett had testified, it's not the billion dollar in

12 contract level insurance fees that are included in that, it's

13 just the investment management, the investment administration

14 and the distribution fees. Correct?

03:06 15 A. Yes.

16 Q. The contract level insurance fees are a whole another

17 ball game it's a whole another set of fees that FMG charges to

18 the contract holders; right?

19 A. Yes.

03:06 20 Q. Counsel was asking you about pricing and compliance and

21 your knowledge of that. Can I have you look at Plaintiff's 46

22 in evidence.

23 Do you have Plaintiff's 46? Can I direct your

24 attention to page 8 of this document. Do you have that

03:07 25 section?

Redirect - Pomerantz - Sweetser

1 A. Yes.

2 Q. Do you see the section called Pricing?

3 A. Yes.

4 Q. Will you explain to the Court what that document says

03:07

5 about who does the pricing for the plaintiffs' mutual funds

6 and the other funds in the EQAT complex?

7 A. It says that: Information should be provided to JP

8 Morgan no later than 4:00 p.m. every day; for securities in

9 which JP Morgan cannot obtain prices from an automated pricing

03:08

10 service, pre-approved by AXA Equitable, the sub-advisor is

11 responsible for arranging the provision of a daily current

12 price from an independent entity; JP Morgan will contact the

13 independent party identified on a daily basis.

14 Q. Does that comport with your recollection and your

03:08

15 testimony that JP Morgan and/or the sub-advisors provide the

16 pricing information for the vast majority of the securities

17 involved in this case?

18 A. Yes.

19 Q. Counsel also was asking about compliance and the basis

03:08

20 for your understanding of that the compliance is delegated to

21 JP Morgan and the sub-advisors; can you please turn to page 10

22 of that very same document.

23 A. Yes.

24 Q. Would you please read that and tell the Court what that

03:08

25 document says about whether or not compliance services are

1 delegated by FMG to others.

2 A. There's a section for daily compliance that states: That  
3 JP Morgan fund administration will monitor holdings and  
4 activity; JP Morgan will add an issue to a compliance log when  
5 there are issues; JP Morgan will provide the compliance log to  
6 the sub-advisors only when issues exist; a log will not be  
7 sent when there are no issues; if JP Morgan detects a  
8 violation a memo outlining the problem will be provided to the  
9 sub-advisor.

10 Q. First of all, that section's entitled Compliance;  
11 correct?

12 A. Yes.

13 Q. And that section talks about daily, monthly and quarterly  
14 compliance obligations by JP Morgan; correct?

15 A. Yes.

16 MR. SWEETSER: Nothing further.

17 THE COURT: All right. You may step down, Mr.

18 Pomerantz. Thank you for coming today. And yesterday.

19 (Witness excused. )

20 THE COURT: Next witness?

21 MR. SWEETSER: I'm sorry, your Honor, the next  
22 witness is plaintiffs' expert Phil Goldstein who we scheduled  
23 for Tuesday.

24 THE COURT: So you're finished for today.

25 MR. SWEETSER: Finished for today.



1 THE COURT: All right. Is there any other  
2 information that you can could today?

3 MR. SWEETSER: Yeah, I think, your Honor, we can  
4 probably confirm the exhibits submitted into evidence; we have  
5 the issue of the subpoena that we served on both FMG and the  
6 Milbank firm which perhaps we can address today.

7 THE COURT: All right. So let's go over exhibits.  
8 We didn't do yesterday either; right? Are you ready?

9 MR. MURPHY: Yes, your Honor.

10 THE COURT: I don't think I went over the exhibits  
11 yesterday; is that right? So I'll start with 128 forward.

12 Are we already with that, Mr. Korn? Mr. Murphy?

13 MR. MURPHY: Yes, your Honor.

14 THE COURT: I have 151-A; 151-E; did I say one?

15 MR. SWEETSER: You were correct, your Honor.

16 THE COURT: I have P-151-E; P-67; P-167; Defendant  
17 2059. I'm not sure about that actually.

18 MR. SWEETSER: Your Honor, I didn't move that into  
19 evidence, that was just for identification.

20 THE COURT: All right. Admitted P-151-J; admitted  
21 P-151-K; admitted Defendant's Exhibits 1886 and 1886.1.

22 That's what I have.

23 MR. SWEETSER: Your Honor, the only one I got as  
24 missing is P-151-I.

25 THE COURT: I know. No one asked me to admit it, we

1 went right by it.

2 MR. SWEETSER: Your Honor, I looked at the  
3 transcript about this because there was an issue today, and my  
4 understanding from the transcript is that I did request that  
5 it be admitted and that you did admit it. I can show it to  
6 your Honor.

7 THE COURT: I don't think I admitted it.

8 MR. MURPHY: I don't think you admitted it. You  
9 said -- you asked me, your Honor, why wouldn't it be within my  
10 discretion to admit it, and I reluctantly admitted it was  
11 within your wide discretion, but I don't think you ever  
12 admitted it, and we do have quite a number of objections to  
13 that exhibit.

14 I would add to that, your Honor, that you recall  
15 that the plaintiffs had -- you had requested -- we had  
16 requested and you had ordered the plaintiffs to give us the  
17 source documents for that chart. They told us that the  
18 documents Dr. Pomerantz relied on were really from one  
19 document in 2008, two documents from 2009 and '10; and then  
20 P-51 through P-54, two of those six documents, your Honor,  
21 were -- were July 2014 and July 2015 Board materials that  
22 didn't even exist until after Mr. Pomerantz created his  
23 report. They couldn't possibly have been the source data.  
24 Mr. Pomerantz said that he used annual reports, none of these  
25 documents are annual reports. And we've been unable to match

1 up any of the asset data in his work papers to any of the  
2 numbers that appear in these various source documents.

3 I would also note that we talked about his analysis  
4 starting in 2007; the earliest document they produce is  
03:15 5 documents that shows assets for 2008, so we still don't have a  
6 source document for the beginning assets. The document is not  
7 reliable at all at this point. I believe there are several  
8 errors with it; it's labeled October 12th, not May 12th which  
9 Mr. Pomerantz admitted was the case. And if it does go back  
03:15 10 May 12th, 2012 for five years, I would note that it goes back  
11 to May 2007; the relevant time period here is, you know, mid  
12 2010 to 2014 and they're trying to put in these "losses" based  
13 on faulty data with no source documentation for the bulk of  
14 that period is not even an issue in the case.

03:15 15 MR. SWEETSER: Your Honor, if I may, what counsel  
16 forget to mention is he asked me this after the deposition,  
17 and a year or so ago I gave him exactly what I gave him again  
18 yesterday. He's had the information, the documents go back to  
19 the time period, the Court can obviously attach whatever  
03:16 20 weight the Court wants to attach to it.

21 And your Honor, yesterday after I moved it in and  
22 counsel objected and your Honor said, and I've got it right  
23 here, it's page 1895 of the record, and you were telling Mr.  
24 Murphy: Let's just stick with the one issue for now Mr.

03:16 25 Murphy and we'll get to the others; so Mr. Murphy, with regard

1 to this chart I understand all of your criticisms of it, but I  
2 can admit it into evidence and what weight I give to the chart  
3 would be a little different nature.

03:16 4 So I interpreted that to mean that you admitted the  
5 document.

6 THE COURT: Well, I clearly have in my notes -- I  
7 know I said that to Mr. Murphy, but I clearly have in my notes  
8 that I didn't submit it into evidence, because you went on to  
9 your next question. So I just let it go.

03:16 10 MR. SWEETSER: Well, your Honor --

11 THE COURT: But at any rate, you're making that  
12 motion at the present time.

13 MR. SWEETSER: Correct, your Honor.

03:17 14 THE COURT: So, my view is that I understand all of  
15 Mr. Murphy's reasons, and quite frankly the chart itself, just  
16 from my review of it, the dollar loss was really a comparison  
17 of returns between a couple of different funds or against a  
18 couple different benchmarks and a Lipper whatever it is; it's  
19 a much different than the caption of it portrays.

03:17 20 At any rate -- and as I had indicated to Mr. Murphy,  
21 I'll give it whatever weight I believe it really deserves, so  
22 I'll admit 151-I. And the reason I'm doing it, it represents  
23 the work of Mr. -- Dr. Pomerantz, which we'll see how the  
24 Court assesses that in terms of credibility and things of that  
03:18 25 nature as we go through our determination.

1 MR. MURPHY: Thank you, your Honor.

2 (Plaintiff's Exhibit 151-I was marked into  
3 evidence.)

4 MR. SWEETSER: Thank you, your Honor.

03:18 5 THE COURT: All right. Any other issues?

6 MR. SWEETSER: Your Honor, and then the one other  
7 order of business was again the Court's handling of the  
8 subpoenas that were issued on the Milbank firm and FMG. Just  
9 to refresh the Court's recollection, subpoenas were issued  
03:18 10 with respect to the creation of the summary charts that the  
11 defendants include in the Board materials. Ms. Louie at a  
12 minimum during her testimony admitted that she still has an  
13 e-mail from Mr. Benedict with changes to one of the three  
14 charts; one of those changes -- the only one she could recall  
03:18 15 as your Honor may recall would be a sentence was we do X, Y,  
16 Z, and other things, and Mr. Benedict had suggested that  
17 putting in something that embellished that description of the  
18 services. She didn't recall anything else that was in that  
19 document.

03:19 20 Because it's a document that the Court has admitted  
21 into evidence and because the documents that we are seeking go  
22 to the creation of those documents, you know, we would request  
23 that the Court at a minimum order the defendant and defense  
24 counsel to at least provide to the Court for an in camera  
03:19 25 inspection any documents that were exchanged between the

1 parties, any interoffice e-mails between the Milbank firm  
2 going into the creation of these summary charts that again,  
3 your Honor, are in evidence and were provided to the Board.

4 THE COURT: Mr. Korn?

03:19

5 MR. KORN: Your Honor, I just want to clarify one  
6 thing; is that -- is that all that plaintiffs are seeking  
7 right now, is that document -- those documents? Are they  
8 withdrawing their efforts to -- to call as witnesses Milbank  
9 witnesses, and FMG witnesses on this issue?

03:19

10 MR. SWEETSER: Your Honor, so first of all, it's not  
11 one document, I don't know what other documents there are; it  
12 would be whatever Milbank exchanged amongst themselves, you  
13 know, with respect to input for the creation of the summary  
14 charts. However, we certainly don't want to burden the  
15 Milbank firm by taking any depositions unless we deem it  
16 necessary.

03:20

17 So again, I think the first thing to do is we'd like  
18 to see the documents, or again at a minimum if your Honor's  
19 not inclined to do that, have your Honor do an in camera  
20 inspection. If your Honor believes the plaintiffs are  
21 entitled to the documents we'd like to see whatever there is,  
22 and we certainly don't want to create anymore work for anyone  
23 in this case, and if it's not necessary to take a deposition  
24 then we don't do so. But until we see the documents we can't  
25 make a determination as to whether or not we want to take a

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1 deposition.

2 MR. KORN: Well, your Honor, the subpoenas that were  
3 issued asked for more than a deposition, they asked for trial  
4 testimony and they asked for documents. We filed timely  
03:20 5 objections to both of those subpoenas. Frankly after the  
6 testimony of both Mr. Joenk and Ms. Louie, I thought this  
7 issue would have disappeared, because Mr. Joenk testified  
8 explicitly with regard to the provision of the side-by-side  
9 charts to the Board at the Board's request; Ms. Louie  
03:20 10 testified in detail with regard to the fact that she created  
11 the charts, she received some input from Milbank -- and that's  
12 frankly a fact that plaintiffs have known about for a long  
13 time. They sent a request for admission, they were well aware  
14 that Milbank was involved in reviewing these charts.

03:21 15 These are three documents out of thousands --  
16 frankly hundreds of thousands of documents; are we going to  
17 have this analysis with regard to every document that was  
18 provided to the Board? Just by the fact that litigation had  
19 been filed doesn't mean that plaintiffs are entitled to an  
03:21 20 inquiry with every document that Milbank reviewed that  
21 eventually went to the Board. I mean it's frankly to be  
22 expected that if litigation has been filed putting an issue --  
23 what the Board does that Milbank would be involved in the  
24 process, and at least review the materials that it provided to  
03:21 25 the Board.

03:22 1 This is nothing but a fishing expedition, it's a  
2 waste of the Court's time and energy, and frankly we don't  
3 believe there's -- it is appropriate in any regard that they  
4 should be able to have discovery with respect to the creation  
5 of these documents, because this document is no different than  
6 thousands of documents that would have been --

7 THE COURT: When you say the creation of the  
8 document, what document -- can you just give me a reference as  
9 to what document you're talking about?

03:22 10 MR. SWEETSER: Certainly, your Honor. After this  
11 case was initiated, FMG's in-house counsel, with the admitted  
12 input of the Milbank firm, including comments, created a  
13 side-by-side chart. It was called -- I'll call that one the  
14 management side-by-side chart, because after we amended the  
03:22 15 complaint they then created two other similar type documents.

16 It's a chart that has on one side FMG does X, and  
17 then on the other side the sub-advisors, you know, do Y. And  
18 obviously in our view it is very self-serving document that  
19 plays up what FMG does as opposed to the delegation of the  
03:22 20 services to the sub-advisor.

21 A year later we amend the complaint to add our  
22 administration claim, shortly thereafter there is an  
23 administration chart, side-by-side chart created, again by the  
24 in-house legal department. Now, I heard what Ms. Louie said,  
03:23 25 Ms. Louie said that that one, she doesn't recall Mr. Benedict



03:23 1 or anyone else in the Milbank firm having any input to. But  
2 that's contrary to requests for admissions that they responded  
3 to saying that input and comment was made by the Milbank firm  
4 with regard to all three charts. And when I say three charts,  
5 after they did the administration side-by-side chart they then  
6 did another side-by-side chart which included the  
7 administration services and the management service on one  
8 chart.

03:23 9 So these are three separate side-by-side charts that  
10 plaintiffs believe -- plaintiffs believe deliberately  
11 understate the services delegated to FM -- to sub-advisors and  
12 JP Morgan; that they admit in requests for admission they were  
13 involved in the review and comment on. We heard one comment,  
14 the only comment that I know about is -- is exactly what we're  
03:24 15 talking about. I don't know if your Honor recalls Ms. Louie's  
16 testimony and I don't recall specifically, but I do recall she  
17 said was there was a description that was sent over to the  
18 Milbank firm about a level of services, and Mr. Benedict  
19 specifically said to add a word in to, you know, embellish and  
03:24 20 increase the number of services.

21 And your Honor, given that these charts are provided  
22 to the Board, given the involvement here, we're not asking for  
23 every single document; I'm not exactly sure what Mr. Korn's  
24 argument pertains to. All we're asking about are documents  
03:24 25 relating to the exchange of information between the FMG and

03:24 1 the Milbank firm, any internal e-mails by the Milbank firm  
2 that go into the creation of these three documents to -- that  
3 were given to the Board and we believe were relied on by the  
4 Board, experts relied on them. And again, we believe we're  
5 entitled to know what input Milbank had in saying that the  
6 services should be more -- you know, should be depicted as  
7 being more than what they are.

03:25 8 MR. KORN: Your Honor, the one thing I want to  
9 continue to emphasize is that this was a document that was  
10 created at the request of the Board. It was not a document  
11 created for the purposes of litigation. There's nothing  
12 unique or different about these side-by-side charts.

03:25 13 And I do want to clarify one thing also; with regard  
14 to the request for admissions that indicated that Milbank was  
15 involved in the creation of all three charts or reviewed all  
16 three charts, we have confirmed that we were only asked to  
17 comment or did comment only on that one chart. So to the  
18 extent that the request -- the response to the request for  
19 admission was inaccurate with regard to the other two charts,  
03:25 20 that was the case, we were only involved with regard to that  
21 one chart.

22 THE COURT: Was that the management chart?

03:25 23 MR. KORN: That was the management charge. And we  
24 did provide comments and Ms. Louie testified to that fact  
25 already. And frankly --

1 THE COURT: So that was her conversation with Mr.  
2 Benedict I believe it was?

3 MR. SWEETSER: Your Honor, I believe it was an  
4 e-mail communication and she could recall one of -- I don't  
5 remember; I think she said that there were multiple comments  
6 that he said, she could remember the one.

7 MR. KORN: Your Honor, the other point that I would  
8 make here are these charts were exchanged in discovery, they  
9 were exchanged prior to the depositions of the independent  
10 trustees, questions could have been asked with regard to this.  
11 This is -- you know, they tried to do this with regard to JP  
12 Morgan earlier in the case, they're trying again to do with  
13 regard to Milbank and FMG with regard to these documents.

14 THE COURT: So if they were disclosed to the Board  
15 and to others, what's the problem with the document itself?  
16 Are they e-mails? I don't understand the nature of it.

17 MR. KORN: My understanding of what Mr. Sweetser is  
18 looking for is that consistent with Ms. Louie's testimony  
19 where she said that she had sent the side-by-side chart for  
20 Mr. Benedict's review --

21 THE COURT: We went through that.

22 MR. KORN: Right. What they're looking for is Mr.  
23 Benedict's response with his suggested revisions to the chart;  
24 that's what they're looking for which we believe that they're  
25 not entitled to.

1 THE COURT: All right. And why don't you think  
2 they're entitled to that?

3 MR. KORN: Your Honor, they're not entitled to it  
4 because number one, it's something that could have been asked  
03:27 5 for during the course of discovery; discovery is over. This  
6 is a discovery request, that's all it is.

7 THE COURT: Oh, I see.

8 MR. KORN: And there's nothing here that frankly is  
9 relevant to the issues in this case. As I said at the  
03:27 10 beginning of my argument, you know, if we start going down the  
11 path that they're entitled to look at the creation of every  
12 document that was presented to the Board, then we're never  
13 going to end this case.

14 MR. SWEETSER: Your Honor --

03:27 15 THE COURT: Don't threaten that.

16 (Laughter.)

17 MR. SWEETSER: Your Honor, as I understand counsel's  
18 comments to the Board, we're talking about one document. So I  
19 don't know what's being suggested about this taking up too  
03:28 20 much of the Court's time or this being an never ending fishing  
21 expedition. We're talking about one document, if Mr. Korn's  
22 comments are correct; number one.

23 Number two, this goes to the heart of the matter; it  
24 goes to the misinformation that's provided to the Board of  
03:28 25 Directors by the defendants in this case. It goes to

1 counsel's suggestion that embellishing comments are included  
2 in a description of their services. We believe that the  
3 evidence is going to show at the end of the day that again,  
4 the vast majority of the substantive investment management and  
5 administration services are delegated to others.

6 Your Honor's already heard plenty of evidence about  
7 the disproportionate fees that they receive, and this is just  
8 part of it. You know, lawyers, what do you think about this;  
9 oh, you know what, let's put in some good stuff here and  
10 there. I believe Ms. Louie's testimony was also -- I know  
11 with regard to the one comment that I could recall that she  
12 could recall that was included in the charts.

13 So these aren't comments that were not incorporated  
14 into the charts, they were incorporated into the charts, and  
15 we are entitled to know how these charts that are given to the  
16 Board were created. There's no citations in these charts,  
17 none whatsoever, they're given to the Board, and again, you're  
18 going to hear experts come in and testify -- that's how we  
19 found out; we didn't even know during fact discovery, nor did  
20 we have any reason to suspect that the Milbank firm is  
21 consulted on telling FMG what it does, and consulting FMG on  
22 what it should tell the Board about what it does. We had no  
23 reason to suspect that.

24 The second we found out we didn't want to jump to  
25 any conclusions after the expert revealed that fact; we did a

1 request for admissions which we believe was the proper  
2 procedure to follow; they admitted, we then made a request to  
3 the Court to get that information; the request was denied as  
4 being after discovery and we subpoenaed for here -- and as you  
5 know, Judge Arpert did allow us to issue those subpoenas and  
6 that's the subpoena that is before the Court right now.

7 MR. KORN: Your Honor, I would also emphasize that  
8 we have briefed this issue in the past, and these are  
9 communications that are subject to the attorney/client  
10 privilege. You know, I don't want to create this -- you know,  
11 something into a federal case here more than it already is.  
12 And there is a willing to our part with regard to making sure  
13 we don't waive the attorney/client privilege to produce the  
14 communications that Ms. Louie talked about to Mr. Sweetser,  
15 limited to those communications.

16 With the understanding, your Honor, that that's the  
17 end of the inquiry. I mean there is no basis here to, you  
18 know, call as a trial witness, you know, Mr. Benedict or  
19 anybody from the Milbank firm or anything arising out of that.  
20 But with regard to that limited waiver of the attorney/client  
21 privilege we are willing to, you know, end this issue and  
22 produce those limited documents.

23 THE COURT: So, I don't know what question you want  
24 me to answer now.

25 MR. KORN: Well, I think that -- I would think that

03:30 1 would resolve the issue, is that, you know, Mr. Sweetser wants  
2 the documents that Ms. Louie testified to, we are willing to  
3 provide those subject to, you know, making sure that the  
4 attorney/client privilege would not be waived in that  
5 instance.

6 THE COURT: Oh, I see. So with regard to if you  
7 request Mr. Benedict to testify?

03:31 8 MR. KORN: Well, right. And frankly, you know,  
9 there's a lot of case law out there, I don't need to go into  
10 it right now, that information that you can get through fact  
11 witnesses, you know, and you don't have to get to a law firm  
12 that's the way you should go. And so there's no reason why  
13 Ms. Louie's testimony is not sufficient to educate plaintiff  
14 on this issue.

03:31 15 THE COURT: To me it seems that there's been more  
16 than sufficient discovery, there's a ton of documents. And I  
17 actually kind of agreed with your point, Mr. Korn, that this  
18 is, you know, an 11th hour discovery request by subpoena. I  
19 don't see why we would go through that. And I don't see  
03:31 20 where having any attorneys from Milbank testify would clear up  
21 any of the issues that are before the Court. So, my view is  
22 if you wish to disclose the details of that one document or  
23 two documents, whatever it is, from Milbank, and preserve your  
24 right on lawyer/client privilege issues, I can understand  
03:32 25 that. So, Mr. Sweetser would have to come in with a

1 significant application for me to change that up. So, if  
2 that's a little bit of direction for you --

3 MR. KORN: That's fine, your Honor, we'll proceed in  
4 that direction, and we'll be able to get that to Mr. Sweetser  
5 over the weekend.

6 THE COURT: All right. Thank you.

7 All right. So have a good weekend.

8 (Counsel say thank you.)

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